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# MASSACHUSETTS REPORTS

## 231

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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS

JUNE 1918 — JANUARY 1919

HENRY WALTON SWIFT

REPORTER

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**JUSTICES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.**

**HON. WILLIAM CALEB LORING.**

**HON. HENRY KING BRALEY.**

**HON. CHARLES AMBROSE DE COURCY.**

**HON. JOHN CRAWFORD CROSBY.**

**HON. EDWARD PETER PIERCE.**

**HON. JAMES BERNARD CARROLL.**

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**ATTORNEY GENERAL**

**HON. HENRY CONVERSE ATTWILL.**



IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

#### CORRECTION OF ERROR.

On page 59 of 230 Mass. in the report of *Friedrich v. Friedrich* the name of the counsel for the libellant should be *J. M. Kendrick* instead of *J. M. Hendrick*.

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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FRED A. CARPENTER vs. WALTER J. SUGDEN.

Suffolk. March 22, May 13, 1918. — June 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Sale, Warranty. Contract, In writing. Evidence, Extrinsic affecting writings.*

One, who purchased the good will of a garage and its equipment and received a bill of sale in writing and under seal containing this covenant by the seller, "I hereby covenant with the grantee that I am the lawful owner of the said goods, and chattels; that they are free from all incumbrances, that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons," in the absence of fraud inducing the sale, cannot maintain an action of contract against the seller for breach of an oral warranty as to the cost of the equipment purchased.

CONTRACT for breach of an alleged oral warranty of the cost of certain personal property sold by the defendant to the plaintiff by a bill of sale in writing and under seal. Writ dated February 14, 1917.

The action was referred to an auditor and afterwards was tried before *McLaughlin, J.* The material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for him. The judge ruled that in view of a receipt and a memorandum and of the covenant of warranty contained in the bill of sale, described in the opinion, the plain-

tiff, as a matter of law, could not recover by reason of any such oral warranty as he relied on, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*E. I. Smith*, for the plaintiff.

*C. W. Rowley*, for the defendant, submitted a brief.

CARROLL, J. The plaintiff purchased from the defendant the good will of a garage and its equipment. The bill of sale was in writing under seal and contained this covenant: "And I hereby covenant with the grantee that I am the lawful owner of the said goods, and chattels; that they are free from all incumbrances, that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons." The plaintiff relied on an oral warranty that the articles constituting the equipment of the garage cost the defendant the amount set forth in the inventory. There was no evidence of fraud and the plaintiff received all the merchandise mentioned. The judge ruled that the plaintiff could not recover, and directed the jury to return a verdict for the defendant. The plaintiff excepted.

The contract of sale was in writing and contained the entire agreement of the parties. It could not be contradicted by oral evidence that the defendant warranted that the price of the chattels sold was the price paid by him. *MacAlman v. Gleason*, 228 Mass. 454. *Glackin v. Bennett*, 226 Mass. 316, and cases cited. *Goldenberg v. Taglino*, 218 Mass. 357, 359. *Rochester Tumbler Works v. Mitchell Woodbury Co.* 215 Mass. 194, 197. *Scholl v. Killorin*, 190 Mass. 493.

While parol evidence is admissible to identify the subject matter to which a written contract relates, *Swett v. Shumway*, 102 Mass. 365, *Keller v. Webb*, 125 Mass. 88, the evidence of the cost of the equipment was not offered for this purpose. It was offered to show an additional warranty not contained in the written bill of sale, and was therefore inadmissible.

*Exceptions overruled.*

MARIAN E. CHILD & another vs. MARIE C. CLARK & another.  
SAME vs. CHARLOTTE E. WASHINGTON & others.

Bristol. March 27, 1918. — June 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Probate Court, Revocation of decree. Fraud.*

One who, a year after the death, intestate, of the owner of certain land, received a conveyance of a part of it from the heirs, eighteen years later, after the heirs had sold all the remaining land to other persons and had no interest therein remaining, by consent of such heirs procured the appointment of an administrator of the estate of the intestate and a decree of the Probate Court allowing a petition by the administrator under R. L. c. 146, § 18, as amended by St. 1907, c. 236, (St. 1917, c. 296, not then having been enacted,) for leave to sell the whole of the land for purposes of distribution to a person named by him for a price greatly below its value, he and his attorney in procuring the allowance of such decree intentionally refraining from informing the court of the sales by the heirs or of the state of the title or of his part in or his purpose with relation to the proceedings, which was to strengthen his title to certain land which he contended was included in that conveyed to him, the better to maintain a writ of entry begun by him against one of the other grantees of the heirs, and "to use the balance of the land as a club to force" a recognition of his claim. *Held*, that such conduct was a fraud upon the court, and, upon a petition of successors in title to grantees from the heirs of different portions of the land, filed eight months after the entry of the decree, the Probate Court properly might revoke such decree.

The standing of such successors in title to grantees from the heirs of portions of the land affected by the decree for sale as petitioners for the revocation of the decree thus procured by a fraud on the court is not dependent upon any statutory provision and cannot seriously be questioned. *Giles v. Kenney*, 221 Mass. 262, distinguished.

APPEALS from a decree of the Probate Court for the county of Bristol revoking a decree dated October 13, 1916, authorizing the administrator of the estate of Frances E. Curtis, late of New Bedford, to sell certain land at Edgartown for the purposes of distribution. The petition for revocation was filed June 15, 1917.

The appeal came on to be heard by *Braley, J.*, upon the pleadings and an agreed statement of facts and by him was reserved for determination by the full court.

The material facts agreed upon are described in the opinion. R. L. c. 146, § 18, as amended by St. 1907, c. 236, was as follows:

"Section 18. The Probate Court may, upon the petition of an administrator, administrator with the will annexed, or executor unless the will otherwise provides, with the consent of all parties interested or after notice, license him to sell the whole or any part of the real property or any undivided interest therein belonging to the estate of the deceased in such manner and upon such notice as the court orders, for the purpose of distribution; and the net proceeds of such sale, after deducting the expenses thereof and such amount as may be required for the payment of debts and legacies in consequence of a deficiency in the personal property, shall, after two years from the time of the filing of the administrator's or executor's bond, be distributed to the persons who would have been entitled to said real property and in the proportions to which they would have been entitled had it not been sold."

This statute, after the decree, the revocation of which is the subject of these appeals, was further amended by St. 1917, c. 296, to read as follows:

"SECTION 18. The Probate Court may, upon petition of an administrator, administrator with the will annexed, or executor, unless the will otherwise provides, filed within one year after the date of the giving of the executor's or administrator's bond, or if an administrator *de bonis non* shall be appointed within one year after the date of the original appointment of the executor or administrator, then within six months after the date of the giving of a bond by such administrator *de bonis non*, with the consent of all parties interested or after notice, license him to sell the whole or any part of the real property or any undivided interest therein belonging to the estate of the deceased, in such manner and upon such notice as the court orders, for the purpose of distribution; and the net proceeds of such sale, after deducting the expenses thereof and such amount as may be required for the payment of debts, legacies and charges of administration, in consequence of a deficiency in the personal property, shall, subject to the laws governing the distribution of the personal estate of the deceased, be distributed to the persons who would have been entitled to such real property and in the proportions to which they would have been entitled had it not been sold. Before any such license shall be

issued, the petitioner shall file in the Probate Court an affidavit containing the names of all persons known to him as having or claiming any interest in said real estate derived from any deed of conveyance or mortgage by, through or under any of the heirs or devisees, and if it appears that there are any such persons, they shall be notified in accordance with the order of the court, and shall be made parties to the proceedings."

*J. G. Palfrey*, for the petitioners.

*A. E. Seagrave*, for the respondents.

DE COURCY, J. These are two probate appeals from a decree of the Probate Court, revoking, on the grounds of fraud, a decree dated October 13, 1916, authorizing the administrator of the estate of one Frances E. Curtis to sell certain real estate for the purpose of distribution.

Mrs. Curtis died in 1897, intestate. Her sole heirs were Charlotte E. Nugent (now Charlotte E. Washington) and Love P. Chamberlain; and her only property was the parcel of real estate in question, situated on Chappaquiddick Island, Edgartown. These two heirs in 1898 by warranty deed conveyed a portion of the premises to the predecessor in title of the petitioners Marian E. Child and Edith H. Bass, (herein referred to as the petitioners,) and another portion to the respondent Charles S. Simpson. In 1901 they conveyed all their remaining right, title and interest in the premises described in said decree, to one Harrison H. Child, whose title is now vested in part in the petitioner Edith H. Bass, and in part in the petitioner Marian E. Child.

Recently the present respondent Simpson brought a writ of entry in the Land Court against the present petitioner Edith H. Bass to determine the boundary between their respective portions of the premises in question. In order "to strengthen his title to the land claimed by him in that litigation and to use the balance of the land as a club to force the petitioners to recognize the justice of his said claim," Simpson engineered the following scheme: he secured administration on the estate of Frances E. Curtis by means of the consent of the two heirs, Charlotte E. Nugent and Love P. Chamberlain, who had sold out the only assets of the estate eighteen years before; he procured a decree for the sale of the premises for the purpose of distribution, and a conveyance thereof to one Marie C. Clark, who held her title as his mere nominee and sub-

ject to his direction; and he caused the property to be appraised and sold for \$75, — a figure greatly below the value thereof — \$40 of it being paid to said heirs for their participation in the scheme. Simpson controlled the entire proceedings in the Probate Court, intentionally refrained from giving any notice, formal or otherwise, to the petitioners whom he was depriving of the legal title to their land, and intentionally refrained from informing the Probate Court as to the state of the title, or his part and purpose with relation to the proceedings.

It would be a reproach to our law if such an injustice to the rights of the petitioners could be perpetrated by means of a fraud practised upon the Probate Court (as that court has found), and no redress be afforded. That the Probate Court has a broad power to revoke or correct its decrees on the ground of fraud practised upon the parties or upon the court is too well established to require discussion. *Tucker v. Fisk*, 154 Mass. 574. *Harris v. Starkey*, 176 Mass. 445. *Phillips v. Chase*, 203 Mass. 556. *Sampson v. Sampson*, 223 Mass. 451, 462. *Raymond v. Cooke*, 226 Mass. 326. *McKay v. Kean*, 167 Mass. 524. And the record discloses ample justification for the exercise of that power.

The right of these petitioners to bring to the attention of the Probate Court the fraudulent scheme by which its decree had been procured as an instrument of oppression, cannot be seriously questioned. No one had more interest in the effect of the decree than those whose property it purported to take without a hearing. Presumably the court could take action on these facts, regardless of how they were called to its attention, and so prevent Simpson from profiting by his own wrong. See *Stevens v. Palmer*, 15 Gray, 505, 506; *Langley v. Conlan*, 212 Mass. 135. And a petition for revocation of the decree and license dated October 13, 1916, was a suitable procedure to adopt.

The case of *Giles v. Kenney*, 221 Mass. 262, relied on by the respondents, affords them no support. The narrow question of statutory construction there decided was, that a mortgagee to whom the heirs had mortgaged the real estate of a deceased person before the appointment of an administrator, was not one of the "parties interested" within the meaning of R. L. c. 146, § 18, as amended, and entitled to notice of a subsequent petition for sale for the purpose of distribution, and to appeal from the decree.

See now St. 1917, c. 296. The complaint against the decree in the present case is not that the respondents failed to comply with the formal requirements of the statute, but that they used that procedure as a sham and pretence to secure the instrumentality of the Probate Court in carrying out a fraudulent scheme.

The decree of the Probate Court revoking the decree of October 13, 1916, is affirmed with costs.

*So ordered.*

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THOMAS F. MURRAY vs. HARRY LIEBMANN.

Middlesex. March 15, 1918. — July 1, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Way, Public. Practice, Civil, Judge's charge, New trial, Exceptions.*

A pedestrian upon a sidewalk which is a part of a public way, while stopping near the curb for the purpose of conversation with another pedestrian upon the sidewalk, has a right to assume that drivers of vehicles using the part of the way wrought for carriage travel will exercise ordinary precaution to avoid having their vehicles come into contact with him.

If, after the judge presiding at the trial of an action of tort for personal injuries has given proper instructions to the jury as to the plaintiff's right of recovery for loss of earning capacity, he also, subject to an exception by the plaintiff, states "that while he himself did not believe that the law was correct, nevertheless it was the law," and, afterwards, that, "if they found that a man of the plaintiff's capabilities would, except for this accident, have been worth more as a salesman of bonds than he was actually worth, they should allow him whatever loss he had proved in that regard," the plaintiff's exception must be overruled because it is plain that the jury could not have misunderstood the judge's meaning and because his statement of the law was correct.

Exceptions to rulings of law made upon a motion for a new trial can be taken only to rulings upon questions which arise for the first time at the hearing upon such motion.

If the judge presiding at a trial, during the course of the closing argument of the counsel for the plaintiff, by motions of his head shows dissent from the counsel's statements and the plaintiff does not except to such conduct of the judge before the verdict, the propriety of such conduct cannot be brought before this court for determination by an exception to a refusal to grant a motion for a new trial based upon such alleged impropriety.

TORT for personal injuries caused on March 6, 1915, when the plaintiff was standing on the sidewalk on Winter Street in Boston, by his being struck by tires on and projecting over the running



board of the defendant's motor car which was drawing up to the curb. Writ dated June 2, 1915.

In the Superior Court the action was tried before *Wait, J.* The material evidence, portions of the judge's charge and the course of the trial are described in the opinion. At the close of the evidence and again at the close of the charge, the plaintiff asked for the following rulings:

"1. A man standing on the edge of the sidewalk is not bound to anticipate danger from being hit by projecting parts of vehicles which are passing in the street.

"2. It is not evidence of negligence if the jury find that the plaintiff was standing on the edge of the sidewalk with no part of his body projecting over the edge of the curbstone into the street.

"3. If the plaintiff was standing on the sidewalk inside the inner edge of the curbstone, he was in a place of apparent safety.

"4. It is the duty of a person controlling a vehicle or automobile in the street to so operate it that no part of it shall come in contact with a person standing upon the sidewalk.

"5. It is the duty of the person having control of a vehicle in the street when drawing up to a curbed sidewalk for the purpose of stopping, to so manage his vehicle that it shall not come in contact with a person standing upon the sidewalk.

"6. The plaintiff had a right to stop upon the sidewalk for the purpose of holding a conversation with his friend.

"7. The fact that the plaintiff stopped upon the sidewalk for the purpose of conversing with another person is not evidence of negligence.

"8. There is no duty upon a person using the sidewalk to look out for vehicles passing in the street.

"9. There is no duty upon a person using the sidewalk to anticipate danger from vehicles passing or moving in the street."

The judge declined to give these rulings except as they already had been given in the charge. The jury found for the defendant. The plaintiff filed the motion for a new trial described in the opinion, which the judge denied. The plaintiff alleged exceptions.

*A. P. Stone, (M. H. Stone with him,)* for the plaintiff.

*C. S. Knowles,* for the defendant.

*BRALEY, J.* The sidewalk where the plaintiff was standing engaged in conversation with a friend when he was struck and

injured by the slightly overhanging spare tires carried on the defendant's motor car in an upright position upon the running board, formed part of the highway, in the concurrent use of which each party owed to the other the duty of due care. And the plaintiff had the right to assume that drivers of vehicles using the part of the way wrought for carriage travel would exercise ordinary precaution to avoid contact with persons on the sidewalk standing within the curbing. *Hennessey v. Taylor*, 189 Mass. 583, 584.

While the plaintiff's nine requests which the presiding judge said he could not give in terms, were framed in part to meet varying aspects of his alleged rights as a pedestrian, it is sufficient to say that, when the instructions, to which no exceptions were taken, are read with the requests, no reversible error appears. *Cutting v. Shelburne*, 193 Mass. 1, 5. *Commonwealth v. Henry*, 229 Mass. 19.

The plaintiff also excepted to portions of the instructions relating to the cause of his physical condition, and to the measure of damages. The judge, however, in appropriate language told the jury that they were to determine whether the ills of which he complained were attributable to the accident, and if they so determined, he was entitled among other elements of damage to recover for loss of earning capacity resulting from his injuries. The instructions were correct. *Lopes v. Connolly*, 210 Mass. 487. It is true that, when referring to the right of recovery for loss of earning capacity, he also said, "that, while he himself did not believe that the law was correct, nevertheless it was the law;" a form of expression now urged as having been extremely prejudicial. But, if his own opinion may not have been apposite, it is plain that the jury could not have understood him as meaning that it was to be followed, for he further said, that "if they found that a man of the plaintiff's capabilities would, except for this accident, have been worth more as a salesman of bonds than he was actually worth, they should allow him whatever loss he had proved in that regard."

The jury having found for the defendant, the plaintiff filed a motion for a new trial. The record states that during the closing argument of the counsel for the plaintiff on the question of the defendant's liability, "the presiding judge, intending to express his

disagreement with counsel's position as to a matter of law, shook his head. This expression of negation came at the time when the counsel had started to argue the question to the jury, and could have been understood by the jury as expressing the judge's dissent from the counsel's position with regard to the due care of the plaintiff in that respect as a matter of fact." If the counsel deemed that his rights to present to the jury his views had been infringed, there is nothing in the record to show that he did not have an opportunity to except. If under R. L. c. 173, § 106, exceptions may be alleged to rulings upon a motion for a new trial, they are confined to questions which arise for the first time at the hearing upon the motion. *Commonwealth v. Morrison*, 134 Mass. 189. *Loveland v. Rand*, 200 Mass. 142, 144. The plaintiff not having taken any exceptions at the trial and before the verdict, the question of the judge's conduct, although assigned as one of the grounds for setting the verdict aside, is not open. *Lopes v. Connolly*, 210 Mass. 487, 496. And, the granting or denial of the motion having been a matter of discretion, the refusal to order a new trial cannot be reviewed. *Welsh v. Milton Water Co.* 200 Mass. 409.

*Exceptions overruled.*

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**NATHAN MATTHEWS & another, trustees vs. NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY.**

Suffolk. March 25, 26, 1918. — July 1, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Practice, Civil, Conduct of trial, Discretionary excusing of juror, Auditor's report, Withdrawal of evidence on issues not submitted to the jury, Exceptions, New trial. Jury and Jurors. Evidence, Auditor's report, Relevancy and materiality. Negligence, Railroad. Nuisance. Smoke. Damages, In tort.*

At the impanelling of a jury at the trial of an action by two trustees, acting in the same interest, against a railroad company, the plaintiffs challenged peremptorily three jurors and their names were read off and they left their seats before the defendant objected. An objection made by the defendant that the plaintiffs were entitled to but two challenges was sustained by the presiding judge, but, it appearing to the judge from the conduct of one of the jurors as he left his seat that the plaintiffs would not have a fair trial if he remained a member of the

panel, the judge in the exercise of his discretion also directed that the third juror whose name had been read as challenged by the plaintiffs should be excused. *Held*, that it could not be said that the judge's informal exercise of his discretion was prejudicial to the defendant.

An action of tort with a declaration in three counts was referred to an auditor who filed two reports. At the trial of the action the report was introduced in evidence. At the close of the evidence the plaintiff elected to go to the jury upon one count only, and at the request of the defendant many portions of the reports were withdrawn specifically from the jury's consideration by the judge, who, at the defendant's request, read to the jury the portions so withdrawn. The report itself did not go to the jury room and the charge contained instructions in much detail as to the jury's duty to disregard the auditor's rulings of law and those of his findings of fact which were not pertinent to the counts submitted to the jury; and it was *held*, upon a careful review of the record, that no error was committed.

The trial of the action above described lasted six weeks and was complicated by the elimination, upon an election of the plaintiff at the close of the evidence, of two of the counts of the declaration and of much of the auditor's reports. The defendant moved for a new trial and the motion was overruled; and *it was said* that, as a practical matter, if it had appeared to the presiding judge that the defendant's rights had not been safeguarded properly by the jury, it was to be presumed that the motion for a new trial would have been granted.

At the trial of an action of tort against the New York Central and Hudson River Railroad Company for damages caused to property of the plaintiff adjacent to the railroad in Boston by unreasonable and unnecessary excess of smoke, soot and cinders from the defendant's locomotives, it is proper to exclude as immaterial questions asked of the plaintiff in cross-examination as to his applying during the period of the alleged wrongful acts of the defendant for an abatement of taxes on other properties belonging to him on different streets not nearer than a quarter of a mile to the property in question and not affected by the railroad.

At the trial of the action above described, the defendant asked a witness in cross-examination, "You have observed smoke on other roads coming into Boston, I suppose, entering Boston?" and answered, "On the New York, New Haven, and Hartford, yes." On redirect examination the witness then was permitted to testify, subject to an exception by the defendant, that in one of the years covered by the action he had observed about one hundred engines on the New York, New Haven, and Hartford railroad in the vicinity of Cumberland and Durham streets. *Held*, that the evidence was admissible because of the question asked of and answered by the witness in cross-examination.

Part of the property alleged in the action above described to have been damaged was a hotel. The defendant introduced evidence showing the gross receipts of the hotel during a certain period. Subject to an exception by the defendant, the plaintiff was allowed to read a column of payments for taxes and other matters, as prepared by the defendant's expert. Later the entire paper was put in evidence without objection. *Held*, that the exception must be overruled.

Evidence, even if inadmissible, if material and admitted without objection, properly may be considered by the jury.

If, by reason of smoke, soot, cinders and noxious odors emitted unnecessarily and unreasonably by locomotives upon an adjacent railroad, the proprietor of a hotel is unable to use a dining room in the hotel nearest the railroad, and permanently removes it to another part of the building, in an action against the

railroad company for damage caused by its wrongful acts he cannot recover for the expense of the permanent change of the dining room because the wrongful conduct of the defendant was of a temporary nature; but the effect of the conduct of the defendant upon the use of the dining-room should be considered as an element to be included in the diminished rental value of the premises, for which the plaintiff is entitled to be compensated.

In the same action the plaintiff was held to be entitled to recover for damage done to the outer walls of his building as a direct result of the defendant's wrongful emission of smoke and soot upon such walls.

At the trial of the action above described, the judge submitted to the jury four questions calling for the assessment of damages as to four distinct elements. Upon the return of their answers, he ordered them to return a general verdict for the plaintiff which included the sums found by them in answer to the two last questions, but, subject to exceptions by the plaintiff, excluded the sums found in answer to the first two questions. This court held that the damages found in answer to the first question should have been included in the general verdict. It appeared that there was evidence warranting that answer, and it further was *held* that it was unnecessary to order a new trial of that single question of damage, but that the amount found in answer to the first question should be added to the general verdict and that judgment should be entered accordingly.

TORT for damages caused to the Hotel Oxford and the Oxford Terrace, buildings owned by the plaintiffs, by the way in which the defendant during the six years preceding the date of the writ operated trains upon the railroad held by it under a lease from the Boston and Albany Railroad Company. Writ dated December 1, 1909.

The declaration originally contained three counts, only the first of which, by reason of an election made by the plaintiffs at the close of the evidence, now is material. This count is described in the opinion.

The action was referred to an auditor who filed a report and a supplemental report, and afterwards was tried before *Fessenden, J.* At the opening of the trial, after twelve jurors had been called by the clerk and before challenges by the parties were called for, two jurors were excused without objection. The clerk then called two more jurors. In calling the jurors the clerk had placed the cards containing their names on the desk in front of him. These names were printed upon twelve cards. The plaintiffs' counsel then stepped to the clerk's desk, and, in view of the clerk, designated four of the cards as containing the names of four jurors whom the plaintiffs desired to challenge. The clerk took up the cards and turned to the judge, and a conference occurred between the clerk and the judge, not heard by counsel for either party,

which was to the effect that the clerk raised the question whether the plaintiffs could challenge four, and the judge said to the clerk: "You had better proceed to read them — perhaps the defendants would not object," and that if they did object they could except.

At the conclusion of this conference the clerk turned to the jury and began to read aloud the names contained on the four cards, the order in which he read them having no reference to any preference of the plaintiffs. Jurors Neal, McCristal and Rother successively left their seats, and while they were in the act of so doing, and in their hearing, the defendant objected to the plaintiffs being permitted to have four challenges, both of the plaintiffs representing the same interest.

The matter was determined by the judge refusing, subject to an exception by the plaintiffs, to permit them to have more than two challenges, but permitted the plaintiffs to select which two of the three already named by the plaintiffs should be challenged.

A conference then occurred between the judge and both counsel, not in the hearing of the jury, at which the defendant's counsel took the position that Rother should sit on the jury; and the plaintiffs' counsel objected, on the ground that what had occurred would tend to prejudice Rother against the plaintiffs and might deprive the plaintiffs of a fair trial, and asserted that after Rother had left his seat and was passing the counsel's desk he made to the plaintiffs' counsel some sharp remark indicating feeling at his having been challenged, although his precise words were not understood. This statement was disputed by counsel for the defendant. The judge then, in the exercise of his discretion and subject to an exception by the defendant, excused Rother.

Other material evidence and the course of the trial are described in the opinion. At the close of the evidence, the defendant asked for the following among other rulings:

5. "The jury should disregard the views of the auditor as set forth in his supplemental report as to the construction of the act of the Legislature and of the law under which the Trinity Place and Huntington Avenue stations were built and used, and his finding that the operations of the railroad in connection with such stations were unnecessary and avoidable."

8. "The jury should disregard the finding of the auditor in his supplemental report that —

(a) the operations of the railroad in connection with the Trinity Place Station were unnecessary and avoidable;

(b) also the reference to his finding in his original report that the conditions he sets forth brought to the plaintiffs' property a new and different kind of annoyance;

(c) also his statement 'that the annoyance to the plaintiffs was different both in kind and degree and that they were unnecessary and avoidable';

(d) also his statement that he observed the operations of the switching engine as it distributed freight cars in the Huntington Avenue yard;

(e) also his findings of the operations of outward trains on different tracks adjacent to the plaintiffs' property."

The judge submitted to the jury special questions, which, with the jury's answers thereto, were as follows:

"Did the defendant, during the period from December 1, 1903, to December 1, 1909, substantially continuously emit upon and into the plaintiffs' buildings, known as the Hotel Oxford and the Oxford Terrace, from the stacks of locomotives on its location adjoining the said buildings, considerable quantities of smoke, soot, and cinders which it was unnecessary to emit in the reasonable operation of said locomotives and in the reasonable transaction of the defendant's business under its franchise?" The jury answered, "Yes."

"What is the amount of the damage, if any, done to the outer walls of the Hotel Oxford and the Oxford Terrace as the direct result of the defendant's wrongful emission, if any, of smoke and soot upon said walls during the period December 1, 1903, to December 1, 1909?" The jury answered, "\$1,812.50. No interest."

"What was the reasonable cost of moving the old dining room in the Hotel Oxford if the sole or predominating cause of such moving was the wrongful acts of the defendant?" The jury answered, "\$4,365.00, straight interest @ 4 % = \$1,299.21; total, \$5,664.21."

"What was the amount of the damage to the furniture of the Hotel Oxford directly resulting from the defendant's wrongful emission, if any, of smoke, soot and cinders upon said furniture during the period December 1, 1903, to December 1, 1909?" The jury answered, "\$1,500.00. No interest."

"What was the amount of the diminution in the fair market rental value of the Hotel Oxford and the Oxford Terrace during the period December 1, 1903, to December 1, 1909, directly resulting from the defendant's wrongful emission, if any, of smoke, soot, and cinders upon and into said buildings during said period?" The jury answered, "\$65,000.00; interest at 2 % = \$9,673.42; total, \$74,673.42."

Upon the return of the foregoing findings upon the special questions, the judge, without objection or exception of the defendant, ordered a verdict for the plaintiffs based upon the answers of the jury to the two last questions in the amount of \$76,173.42; and, subject to exceptions by the plaintiffs, refused to include in the general verdict the damage as found in the answers to the other questions assessing damages. Both parties alleged exceptions.

*J. F. Jackson & W. G. Thompson, (G. E. Mears with them,)* for the plaintiffs.

*E. A. Whitman,* for the defendant.

DE COURCY, J. This is an action of tort for damages to the property of the plaintiffs, including the buildings known as the Hotel Oxford and the Oxford Terrace, situated on Huntington Avenue in Boston and adjoining the tracks of the defendant's lessor, the Boston and Albany Railroad Company. The first count, on which the plaintiffs elected to go to the jury, alleged that during the six years previous to December 1, 1909, the defendant "unreasonably, carelessly and unlawfully operated locomotives," and "has caused an unreasonable and unnecessary discharge of smoke, soot, cinders, and noxious fumes from said locomotives." The claim of injury from noise, which was included in the specifications, was waived at the close of the evidence.

The case was referred to an auditor and later a trial was had in the Superior Court. A special question on the issue of liability and four questions on the issue of damages were submitted to and answered by the jury. Thereupon the presiding judge, without objection or exception, directed a verdict for the plaintiffs based upon the answers to questions numbered three and four, and ruled that they could not recover for the damage to the outer walls and for the cost of removing the old dining room in the Hotel Oxford, to which questions numbered one and two related.



We consider first the exceptions of the defendant, and in the order argued in its brief.

1. The two plaintiffs were in legal contemplation but one party, and were entitled to challenge only two jurors peremptorily. *Stone v. Segur*, 11 Allen, 568. But in view of the judge's opinion, that the plaintiffs were liable not to have a fair trial if the juror improperly challenged should remain on the panel, (an opinion warranted by the statement of counsel as to the remark made by that juror,) we cannot say that the informal exercise of his discretion by the judge (see R. L. c. 176, § 28) was prejudicial error. R. L. c. 176, § 32. *Commonwealth v. Livermore*, 4 Gray, 18.

2. The defendant contends that its rights were seriously affected by the successive rulings of the judge relative to the auditor's report, and that in any event the judge should have withdrawn from the jury those portions referred to in its fifth and eighth requests for rulings. Many passages were eliminated from the report, but at the request of the defendant the eliminated passages were read to the jury. It was contended that the opening of Trinity Place station for public use in the year 1900 greatly altered the relation of the plaintiffs' property to the railroad. The judge excluded the first portion of said fifth request, "The jury should disregard the views of the auditor as set forth in his supplemental report as to the construction of the act of the Legislature and of the law under which the Trinity Place and Huntington Avenue stations were built and used." And it seems apparent, from an examination of the charge, that the remainder, "and his finding that the operations of the railroad in connection with such stations were unnecessary and avoidable," was presented to the jury as referring only to the unnecessary smoke, soot and cinders. As to the requests numbered eight, all were given except eight (a); and here also "the operations of the railroad in connection with the Trinity Place station" were confined to the unnecessary and avoidable smoke. It should be added that the court instructed the jury with much detail to disregard the auditor's rulings of law, and all his findings with reference to or so far as they related to the second and third counts. And the report itself did not go to the jury room. These exceptions must be overruled.

3. At the close of the judge's charge counsel for the defendant called attention to the specifications as affecting the question of

liability, to the subject of the non-production of documents, and also to the failure to give many of the rulings requested; and several exceptions were taken. Many of these exceptions have not been argued, and presumably are waived; and only three requests (62-64) are specifically referred to. The question was: "Did the defendant, during the period from December 1, 1903, to December 1, 1909, substantially continuously emit upon and into the plaintiffs' buildings, known as the Hotel Oxford and the Oxford Terrace, from the stacks of locomotives on its location adjoining the said buildings, considerable quantities of smoke, soot, and cinders which it was unnecessary to emit in the reasonable operation of said locomotives and in the reasonable transaction of the defendant's business under its franchise?" See *Mellen v. Western Railroad*, 4 Gray, 301; *Hearst v. New York Central & Hudson River Railroad*, 215 N. Y. 268; *Aldworth v. Lynn*, 153 Mass. 53. In view of the evidence and the care with which the judge defined "substantially continuously," in connection with the specifications filed, no error is shown in this respect. The same is true of what the judge said on the subject of the non-production of documents, and of the peculiar position of the plaintiffs' property with reference to the railroad location.

The complaint that the charge did not sufficiently instruct the jury to disregard the evidence as to noise (the claim of damages therefor having been eliminated) does not seem to us well founded. They were instructed in express terms not to allow that evidence to influence them; and many times it was emphasized that the questions before them related only to the unreasonable and unnecessary excess of smoke, soot and cinders. In short, after an examination of the record we cannot say that the subject matter of the requests for rulings, so far as accurate and applicable, was not sufficiently covered in the charge. It would serve no useful purpose to consider them in detail and to quote the portions of the lengthy charge applicable to each.

In the course of a trial lasting six weeks, and complicated by the elimination of two counts in the declaration and of much of the auditor's report, it was doubtless difficult for the jury to discriminate and to disregard impressions that were not applicable to the simple and narrow issues finally submitted to them. But as a practical matter, if it appeared to the presiding judge that the

defendant's rights had not been properly safeguarded by the jury, it is to be presumed that the motion for a new trial would have been granted.

4. As to the remaining exceptions of the defendant: There was no error in the exclusion of the question to the witness Matthews, on cross-examination, as to his application for an abatement of taxes, in 1910, on other properties not nearer than a quarter of a mile to the property here in question, on other streets and not affected by the railroad. It was immaterial to the issues on trial, and the judge well might conclude that it had no direct tendency to contradict the testimony of the witness. The testimony of the witness Larry in redirect examination, that in July, 1908, he observed about one hundred engines on the New Haven road, in the vicinity of Cumberland and Durham streets, was made admissible by the earlier question of the defendant's counsel, "You have observed smoke on other roads coming into Boston, I suppose, entering Boston?" and the answer "On the New York, New Haven, & Hartford, yes." See *Shepard v. Hill*, 151 Mass. 540, 542. The table showing the gross receipts of the Hotel Oxford from 1885 to 1898 having been put in evidence by the defendant, the plaintiffs were allowed to read the column of payments for taxes, etc., as prepared by the defendant's expert. It is enough to say as to the exception taken thereto, that the entire paper later was put in evidence without objection. Finally, the evidence as to the extent of damage to the furniture, even if inadmissible, having gone in without objection, could be properly considered by the jury. *Damon v. Carrol*, 163 Mass. 404. *Rapson v. Leighton*, 187 Mass. 432. *Orpin v. Morrison*, 230 Mass. 529. It follows that the exceptions of the defendant must be overruled.

We next consider the exceptions of the plaintiffs.

1. There was no error in the ruling that the plaintiffs could not recover for the cost of removing the dining room in the Hotel Oxford. The wrongful acts of the defendant were of a temporary nature. If during their continuance the plaintiffs could not use the dining room, the loss occasioned thereby was an element to be included in the diminished rental value of the premises, and was temporary, being limited to the period of unnecessary and avoidable smoke during the six years in question. The change of location would become unnecessary when the defendant resumed the

operation of its railroad in a normal and non-negligent manner. For the expense of this permanent change in the premises the defendant is not liable in this action.

2. To the special question "What is the amount of the damage, if any, done to the outer walls of the Hotel Oxford and the Oxford Terrace as the direct result of the defendant's wrongful emission, if any, of smoke and soot upon said walls during the period December 1, 1903, to December 1, 1909?" the jury answered "\$1,812.50. No interest." The first exception is to the judge's ruling that the plaintiffs could not recover on this item.

If one of the direct results of the defendant's wrongful acts was to blacken the walls by a deposit of soot, the plaintiffs were entitled to damages therefor. That element of damages was not necessarily included in the fourth question, which dealt with the diminution of rental value, and as matter of fact was not treated at the trial as so included. *Parker v. American Woolen Co.* 215 Mass. 176, 182. *Emery v. Lowell*, 109 Mass. 197. The exception to this ruling was well taken.

The record discloses however that there was evidence that it would cost \$2,500 to clean off the accumulation of soot, etc., which would arise in the six years prior to the date of the writ. We cannot say that the court was wrong in admitting this testimony from a witness who had some practical experience in such matters on different buildings, and who had made investigation and obtained estimates as to this cost. The jury also viewed the premises. It seems to us that a new trial on this subordinate item of damages is unnecessary; and that the sum found by the jury (\$1,812.50) should be added to that of the general verdict (\$76,173.42) and that judgment should be entered for the plaintiffs as upon a verdict for the combined amount. St. 1913, c. 716, § 2. See *Simmons v. Fish*, 210 Mass. 563; *Burke v. Hodge*, 211 Mass. 156; *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 391.

*Ordered accordingly.*

## NELLIE F. O'NEIL vs. NATIONAL OIL COMPANY.

Suffolk. March 25, 1918. — July 16, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; CARROLL, JJ.

*Negligence*, Unguarded hole near private way. *Nuisance*. *Agency*, Ratification. *Practice*, Civil, Exceptions. *Joint Tortfeasors*. *Damages*, Mitigation, Part satisfaction by co-tortfeasor. *Release*. *Covenant*, Not to sue.

In an action against an oil company by a housemaid for personal injuries sustained on a foggy evening by falling into an excavation from which a gasoline tank had been removed by the defendant for repairs at the request of the owner of the land, who was the plaintiff's employer, when the plaintiff with two other housemaids was "getting an airing" by walking in the private driveway of their employer, there was evidence that, although the tank when in place was from six inches to a foot from the driveway, yet the excavation made to remove it was four or five feet deep and four or five feet in diameter, and there was some evidence that the unguarded hole extended into the driveway and that the plaintiff was walking on the driveway when injured. *Held*, that it was the duty of the defendant, if shown to have made the excavation, to use reasonable care to guard the work and in a proper way to protect the employees of the landowner lawfully using the driveway from the danger of falling into the hole.

In the same case there also was evidence that the plaintiff when she fell into the hole was walking across the lawn for the purpose of picking a pear. There was evidence that the plaintiff and other maids employed in the household of the landowner picked fruit in the daytime and that no objections had been made, and it was *said* that, even if the plaintiff at the time of her injury was on the lawn and not on the driveway and was looking for a pear, the jury could find that the plaintiff in passing over the lawn, although not invited, was there lawfully so far as the defendant was concerned and could recover for the consequences of its negligence.

In the same case it appeared that the defendant delivered gasoline to the landowner from a truck. The driver of the truck, whose duty it was to sell for the defendant gasoline, oil and tanks, testified that he informed the defendant's president that he was going to "take up and, if possible, repair" the landowner's tank and that the president told him to "go ahead," that the driver paid for the excavating and reported to the defendant's president that the landowner was satisfied with the tank, that a bill for the amount thus paid by the driver was sent by the defendant's president to the landowner and paid by him to the defendant. The defendant asked the judge to instruct the jury that there was no evidence that the act of the driver in digging up the tank was within the scope of his employment. The judge refused to give this instruction. *Held*, that the instruction was refused rightly, as there was evidence of the driver's authority to do the work and that, even if he originally had lacked such authority, his acts were ratified by the president's order to go on with the work and by the defendant's acceptance of payment for it from the landowner.

In the same case the defendant contended that the judge had given an instruction which authorized the jury to find that the driver was acting within the scope of his employment without considering the effect of ratification and express approval, but it appeared that the defendant did not call the attention of the judge to this objection to the instruction given by him and took no specific exception to any part of the judge's charge. *Held*, that the contention, whether warranted by anything in the charge or not, was not open to the defendant.

In the case above described it appeared that before the action was brought the plaintiff had brought an action for her injuries against the landowner, which she discontinued under an agreement by which she covenanted with the landowner not to sue him and received from him the sum of \$1,500, but the instrument containing the covenant not to sue recited that it did not release the plaintiff's cause of action against any one other than the landowner, and it was *pointed out* that the defendant, not being a party to the instrument, could introduce oral evidence to show that the plaintiff accepted the money in release of all claims against her employer, but, although there was evidence which would have warranted such a finding, it also was *pointed out* that this was a question of fact for the jury and that they had a right to find that the money was not accepted for this purpose.

In the same case the defendant asked the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages. The judge refused to give this instruction and the jury returned a verdict for the plaintiff in the sum of \$5,000. *Held*, that, while the jury must have found that the \$1,500 was not received from the landowner to release or discharge him from liability but was received from him in consideration of the plaintiff's covenant not to sue him for the personal injury she had received, the \$1,500 should be applied in reduction of her damages, as she was entitled to but one satisfaction of her claim from all the tortfeasors who caused her injuries, and it was *ordered* that the defendant's exception should be sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500.

TORT for personal injuries sustained on August 2, 1915, from falling into a hole on or near the driveway on the estate of the plaintiff's employer at Westwood, which was alleged to have been dug by the servants or agents of the defendant acting within the scope of their employment. Writ dated November 19, 1915.

The defendant's answer, in addition to a general denial, alleged the acceptance by the plaintiff from Frederick S. Converse of the sum of \$1,500 in satisfaction of all the damages alleged in the plaintiff's declaration, whereby the "plaintiff's cause of action was wholly settled and discharged."

In the Superior Court the case was tried before *Sisk, J.* The evidence is described in the opinion. The agreement under seal containing the plaintiff's covenant not to sue Frederick S. Converse, referred to in the opinion, was as follows:

"Know all men by these presents that I, Nellie F. O'Neil of Boston, in the County of Suffolk and Commonwealth of Massachusetts, in the Consideration of Fifteen Hundred (\$1500) Dollars to me in hand paid by Frederick S. Converse of said Boston, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with Frederick S. Converse, his heirs and assigns as follows:

"(1) That I will forbear to sue or maintain any action, suit or other proceeding, or to make any claim of any nature whatsoever, against the said Frederick S. Converse, for or on account of an accident to me on or about the second day of August, 1915, while in the employ of the said Frederick S. Converse.

"(2) That I will, and my heirs and executors, shall indemnify and hold harmless the said Frederick S. Converse, his heirs and assigns against any loss, damage or expenses which shall be suffered by or to which the said Frederick S. Converse shall be put by reason of any suit, claim or other demand hereinafter made or prosecuted against the said Frederick S. Converse for or on account of the said accident to me.

"(3) That upon the settlement of any claim I have or may have against any one else who may be liable for the injury to me on or about the said second day of August, 1915, I will execute, and deliver to the said Frederick S. Converse or his attorneys, a good and sufficient release of said cause of action.

"(4) That I will and my attorneys shall at the request of the said Frederick S. Converse, execute and deliver an agreement discontinuing the action now pending in which I am plaintiff and the said Frederick S. Converse is named as defendant.

"It is understood and agreed, however, that I do not hereby release my cause of action against any one who may be liable for the injury aforesaid, that I expressly reserve any and all rights against any one else who may be liable and that nothing herein contained shall be construed to prevent any action against any one other than the said Frederick S. Converse, his heirs or assigns.

"In witness whereof I hereunto set my hand and seal this twenty-third day of December, A. D. 1916."

At the close of the evidence the defendant asked the judge to give to the jury the following instructions:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. The only duty which the defendant owed the plaintiff was to abstain from malicious or wilful injury, or from such wanton, wilful or reckless conduct as would amount to wilful or malicious injury.

"3. There is no evidence that the act of Stevenson in digging up the tank was within the scope of his employment.

"4. If you find that the defendant by its agent, Quinn, did not instruct Stevenson to dig up the tank, you must find for the defendant.

"5. If you find that the act of Stevenson, in digging up the tank, was done with the authority of the National Oil Company or its agent, Quinn, and if you find that Stevenson finished the job of digging up the tank and warned Converse or his agents that the excavation should be properly guarded, this would not be evidence of such wilful, wanton or reckless conduct as would amount to setting a trap for the plaintiff by the defendant, and the plaintiff could not under these circumstances recover."

The sixth request was waived.

"7. There is no evidence which would justify you in finding that Stevenson dug the tank up in promoting the defendant's business.

"8. The defendant cannot be held to the same degree of care to the plaintiff as her employer, Converse, would be held.

"9. The employer of the plaintiff (Converse) was obliged to abstain from setting a trap or from acting in such a reckless manner as to set a trap for the plaintiff; but the defendant having dug the hole, had no custody over the premises, and if the defendant, by its agent, notified the employer of the plaintiff of the danger, this would be evidence that it was not guilty of wanton or reckless conduct to the plaintiff.

"10. If the plaintiff walked on the driveway in a fog so thick that she could not distinguish her companions, when she was not engaged on any errand of her employer, this would be evidence of lack of due care on her part for the jury to consider, unless they find it was absolutely necessary for her health and well being to take a walk in the night in question.

"11. It is for the jury to say whether it was negligent for the plaintiff, while engaged on an errand of her own, to leave the



driveway for the purpose of crossing on the lawn in a fog so thick that she could not distinguish her companions.

"12. If the jury find as a fact that the plaintiff did leave the driveway for the purpose of getting a pear for herself in a night when the fog was so thick that she could not see her companions, this would be evidence which would warrant a finding that she was not in the exercise of due care.

"13. The defendant owed no greater duty to the servant of Converse than he did to Converse himself, and if you find that he had warned Converse, or one of his agents or servants, or if you find that he had requested Converse or his agents or servants to cover or protect said hole or put a warning light upon said hole, the defendant was not guilty of such reckless conduct as would amount to setting a trap for the plaintiff.

"14. The defendant had no control of the premises upon which the plaintiff was injured, and if you find that Stevenson dug the hole with the authority of the defendant and warned Converse through his agents or servants of the necessity of guarding said hole, the defendant was not guilty of negligence of such a degree as would warrant a verdict for the plaintiff.

"15. The covenant not to sue must be taken by you together with the letters that have been introduced in evidence and the statements of the plaintiff in deciding whether the plaintiff intended to discharge or release Converse from all liability, and, if you find on all the evidence that the plaintiff intended to discharge or release Converse from all further liability by the receipt of \$1,500, you must find for the defendant.

"16. The defendant owed only a duty to the plaintiff which is owed to a bare licensee, namely to abstain from such negligence as amounted to wanton or wilful misconduct.

"17. The plaintiff, in using the driveway, which led past the tank, was a bare licensee.

"18. The plaintiff was at best a bare licensee of Converse, if she turned from the driveway and went in search of fruit.

"19. The plaintiff on all the evidence was never granted any permission by Converse to pick fruit for her use.

"20. If the jury find there is any liability on the part of the defendant, they must consider the payment of \$1,500 by Converse in mitigation of damages."

The judge refused to give any of these instructions and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$5,000. The defendant alleged exceptions to the judge's refusal to give the instructions requested "and to so much of the charge as was inconsistent with the said instructions."

*J. J. Cummings*, for the defendant.

*J. F. Ryan*, for the plaintiff.

CARBOLL, J. The plaintiff was injured by stepping into a hole containing a gasoline tank, near a private driveway on the premises of Frederick S. Converse, by whom she was employed as a housemaid. One of her duties was to pick flowers for the table from the garden. The defendant delivered gasoline to Converse from a truck driven by one Stevenson in its employ; the gasoline was poured into a tank buried in a grass plot near the edge of a circular driveway. It was thought there was a leak in the tank and Stevenson hired a man to take the tank up. A round hole about four or five feet in diameter and four or five feet deep was dug, and left open and unprotected for three days; when in this condition between eight and nine o'clock on a foggy night, while the plaintiff, in company with two other housemaids employed by Converse was "getting an airing," she fell into the hole and was injured. She testified that she did not leave the driveway, that the hole extended into it, and that she was injured while in the driveway. There was other evidence indicating that she fell on the lawn while on her way to get a pear from one of the trees. Stevenson, the driver of the truck, whose duty it was to sell for the defendant gasoline, oils and tanks, testified, that he informed Quinn, the defendant's president, that he was going to "take up and, if possible, repair Mr. Converse's tank," and Quinn told him to "go ahead." Stevenson paid for the excavating and reported to Quinn that Converse was satisfied with the tank; a bill for the amount paid by Stevenson was sent to Converse by Quinn. The plaintiff entered into a covenant not to sue Converse and received from him \$1,500. The jury found for the plaintiff in the sum of \$5,000.

The jury could have found that when injured the plaintiff was not upon the lawn, but was on the driveway. She so testified, and there was evidence that while the tank was from six inches to a

foot from the driveway before the excavating was begun, the hole made by the defendant's direction was four or five feet deep and four or five feet in diameter. There was, therefore, some evidence that the unguarded hole extended into the driveway and that the plaintiff while walking thereon was injured.

The defendant in doing the excavating was an independent contractor, whose duty it was to use reasonable care to guard the work, and in a proper way to protect the employees of Converse, lawfully using the driveway, from the danger of falling into the hole. If the hole was in the driveway designed and used for travel, the defendant was bound to anticipate that it was a source of danger to persons walking thereon, and to provide against what was likely to happen. *Hill v. Winsor*, 118 Mass. 251. *Boutlier v. Malden*, 226 Mass. 479.

The defendant relies on *Carey v. Baxter*, 201 Mass. 522, where the plaintiff was injured by falling from the side door of her tenement because of the removal of three wooden steps by a contractor who was excavating for a walk to be laid along the sidewalk in front of the house and from the street to the front door and to the side door. That case is plainly distinguishable from the case at bar. The plaintiff had been told by the landlord what was to be done; she knew that the work involved the removal of the steps and she could see from her tenement that the work was going on. The defendant had no reason to suppose that the plaintiff was ignorant of the condition of the walk and the removal of the steps, and he had no reason to anticipate harm to the plaintiff. It was not probable that she would attempt to use the steps when she could see to what extent the work was done and the defendant was not bound to foresee the improbable.

In the case at bar the plaintiff testified she had often, before this time, taken walks, passing where the tank was, though she did not remember seeing it. In using the driveway for her own convenience she was rightfully on the premises, and stood toward the defendant in the right of her employer. While the defendant had the right to dig the hole on the employer's premises, it was liable to the plaintiff for its negligence, she being lawfully where she was. *Boutlier v. Malden*, *supra*. *Massaletti v. Fitzroy*, 228 Mass. 487, 492, 493 and cases cited.

It does not clearly appear how long after the opening was made

the injury happened; but the jury must have found that it occurred before the work undertaken by Stevenson was completed, and accepted by Converse. Stevenson testified that he asked the chauffeur or gardener to "look out for it, and put some boards around it." This the chauffeur denied. But, even if it were found to be true, the defendant was not relieved of its responsibility as an independent contractor, by delegating its business to an employee of Converse who had no authority to relieve the defendant of the duty it had assumed. Nor was the defendant relieved from liability to the plaintiff merely because Stevenson said to Converse that he thought it "a good idea to fill the tank and leave it open so in case it showed a leak next day, it would not have to be dug up again." The work had not been accepted by Converse at this time, and there is nothing to show that he was informed or had any knowledge that the opening was left unguarded and unprotected.

There was evidence that the plaintiff and the other maids picked fruit in the daytime and no objections had been made. Even if she were on the lawn and not on the driveway and at the time was looking for a pear, the jury could infer that in passing over the lawn, although not invited, she was not there unlawfully so far as the defendant was concerned and could recover for its negligence. *Massaletti v. Fitzroy, supra*.

There was evidence that Stevenson was authorized to do the work. Before undertaking it he reported to the defendant's president and was authorized to go on with it; moreover, he was reimbursed for the amount expended by him, and Converse paid the defendant for the work it had done. This was evidence of a ratification, and by adopting the act of Stevenson, the defendant became responsible for his conduct in performing the work. *Dempsey v. Chambers*, 154 Mass. 330. *Nims v. Mount Hermon Boys' School*, 160 Mass. 177.

The defendant asked the judge to instruct the jury that "there is no evidence that the act of Stevenson in digging up the tank was within the scope of his employment." As there was evidence that the act was authorized and ratified, this request was properly refused. The defendant further contends that the judge left it to the jury to find that the act of digging the hole was within the scope of Stevenson's employment, independently of the talk be-

tween him and Quinn. This part of the charge is open to the construction that the judge was then calling the jury's attention to the distinction between the acts of Stevenson done for some purpose of his own, and the acts of the corporation; and that, irrespective of the talk with Quinn, the corporation would not be liable for such acts of Stevenson. Following this the judge instructed the jury on the meaning to be attached to the talk with Quinn. But, even if the instruction authorized the jury to find that Stevenson was acting within the scope of his employment without considering the evidence of ratification and express approval, and assuming that there was no evidence in the case to support this instruction, the question now urged is not before us. The bill of exceptions recites: "the defendant claiming to be aggrieved by the rulings and refusal of the court to rule as requested and to give the instructions as requested, submits this bill of exceptions." The defendant did not call the judge's attention to the objection it now relies upon; it excepted generally to the rulings, and saved no specific exception to any part of the charge as given. See *Barker v. Loring*, 177 Mass. 389; *Leverone v. Arancio*, 179 Mass. 439, 447; *D'Arcy v. Mooshkin*, 183 Mass. 382; *Henderson v. Raymond Syndicate*, 183 Mass. 443; *Savage v. Marlborough Street Railway*, 186 Mass. 203.

The question whether the plaintiff accepted the \$1,500 in discharge or release of Converse from all liability for the injuries received by the accident, — she having discontinued the action against him as provided in the agreement, — was a question of fact for the jury. They were fully instructed on this point. The covenant not to sue Converse did not purport to release the defendant; but not being a party or privy to the instrument it could introduce oral evidence to show that the plaintiff accepted the money in release of all claims against her employer, and on the evidence the jury could have so found; but the question was for them to decide, and they had the right to say that it was not accepted for this purpose. *Matheson v. O'Kane*, 211 Mass. 91. *Johnson v. Von Scholley*, 218 Mass. 454.

The defendant asked the court to instruct the jury, "If the jury find there is any liability on the part of the defendant, they must consider the payment of \$1,500 by Converse in mitigation of damages." The request was refused. While the jury must have

found that this money was not received from Converse to release or discharge him from liability and that it was received from him in consideration of the plaintiff's covenant not to sue him for the personal injury she had received, the \$1,500 should be applied in reduction of her damages. She was entitled to maintain an action against each or all who contributed to her injury, but she was entitled to but one satisfaction. Her cause of action was not extinguished by the receipt of the money. It was, however, a partial satisfaction of her claim; and she cannot receive, for the same wrong, remuneration in excess of her actual damage. It would be unjust for a plaintiff to retain money received from one of several tortfeasors under a covenant not to sue him for the injury, and to recover from the other tortfeasor full satisfaction for the same injury. In a joint contract obligation where money is received from one debtor under a contract never to sue him, the payment made in consideration of the agreement is a payment on account of the debt, and to that extent is a discharge of the debt as to all the debtors. See 25 Harv. Law Rev. 203, 218. The same principle applies to an action sounding in tort. In *Dwy v. Connecticut Co.* 89 Conn. 74, 79, the agreement of the plaintiff with one tortfeasor was construed as a covenant not to sue him; but evidence was admitted of the amount paid by him in reduction of damages in the action against the other tortfeasor. This rule was followed in *Bloss v. Plymale*, 3 W. Va. 393, 409, *Snow v. Chandler*, 10 N. H. 92, 95, *Chamberlin v. Murphy*, 41 Vt. 110, 118. The same ruling was made in the trial court in *Rice v. Reed*, [1900] 1 Q. B. 54, 58. It was assumed in the court of appeal that this ruling was correct, and apparently this course was followed in *Duck v. Mayeu*, [1892] 2 Q. B. 511. See also *Heyer v. Carr*, 6 R. I. 45; *Chicago v. Babcock*, 143 Ill. 358; *Miller v. Beck & Co.* 108 Iowa, 575, 578; *Ellis v. Esson*, 50 Wis. 138, 154; *Pogel v. Meilke*, 60 Wis. 248; *Miller v. Fenton*, 11 Paige, 18.

It follows that the instruction asked for should have been given, and this exception must be sustained. The other exceptions are overruled. If within thirty days after the date of the rescript the plaintiff remits all of the verdict in excess of \$3,500, judgment is to be entered for the plaintiff in the sum of \$3,500; otherwise, the exceptions are sustained.

*So ordered.*

**BAUSH MACHINE TOOL COMPANY vs. CHARLES J. HILL & others.**

Hampden. May 20, 1918. — July 16, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

*Unlawful Interference. Labor Union. Strikes. Equity Pleading and Practice, Master's report.*

In a suit in equity against the members of a labor union to enjoin them from interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff, if it appears that one of the purposes of the strike was an unlawful purpose, it is not necessary to consider the legality of another alleged purpose of the strike, because a strike for both a lawful and an unlawful purpose is illegal.

In a suit in equity against the members of a labor union to enjoin them from interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff, it appeared that one purpose of the strike was to unionize the plaintiff's shop, an unlawful purpose, and that another purpose was to obtain an increase of wages, a lawful purpose, and a temporary injunction was issued enjoining the defendants from combining for the purpose of compelling the plaintiff to maintain a closed shop "unless and until the defendants shall formally renounce the purpose aforesaid and give notice to the plaintiff of such renunciation." There were two hundred and fifty defendants, all members of the union. Of these twenty-eight signed a letter and mailed it to the plaintiff stating "their renunciation of their combination or conspiracy to interfere with the plaintiff's business" for the purpose of unionizing the plaintiff's shop and their aiding or abetting the strike against the plaintiff for that purpose. These twenty-eight defendants moved to amend their answer by setting forth this renunciation, and the motion to amend was allowed against the objection of the plaintiff. The trial judge found that the twenty-eight defendants "had notified the plaintiff by mailing to it" the letter described above of their renunciation therein stated, but it appeared that these twenty-eight defendants did not leave the union nor announce a purpose of doing so and that the notice contemplated that the unlawful strike should continue in force and it did so continue. *Held*, that, if the motive of the twenty-eight defendants in continuing the strike was merely to obtain a raise in wages, this motive for their continuing to be parties to an unlawful strike was immaterial and afforded no ground why these twenty-eight defendants should not be enjoined with the other two hundred and twenty-two defendants from maintaining the unlawful strike.

In the suit above described the defendants filed an exception to a finding in the master's report, that the constitution of the Employers' Association would not prevent the plaintiff from settling the strike, on the ground that this finding was a conclusion of law. The constitution of the Employers' Association was not before the court. *Held*, that, in the absence of evidence on the subject, the court could not say that the finding was a conclusion of law; and it also was *pointed out*, that, if the exception were sustained and this finding of the master were stricken from the report, it would not help the defendants.

In the same suit the defendants filed another exception to the master's report on the ground that the plaintiff belonged to the Employers' Association, which was an unlawful one in restraint of trade, and that the plaintiff therefore could not have come into court with clean hands, and undertook to state certain facts in regard to that association. The master in his report did not state that any evidence of the alleged facts referred to in the exception was introduced before him. *Held*, that the exception must be overruled because it rested merely on the assertion of counsel.

An exception to a master's report in a suit in equity must be based on matters appearing on the face of the report and an exception resting only on the assertion of counsel cannot be considered.

In the same case the trial judge had denied a motion of the defendants to recommit the case to the master "for the reasons set forth in their exceptions," and it was *pointed out* that this motion was addressed to the discretion of the trial judge and that there was nothing to indicate an abuse of discretion in denying it, and it also was *said* that, for all that appeared, the trial judge received and considered evidence as to the truth of the alleged facts on which the motion was based and found that the allegations were not true.

In the same case it was *pointed out* that, as the strike was for an unlawful purpose, it was not necessary to consider whether the means employed by the defendants were lawful or unlawful.

BILL IN EQUITY, filed in the Superior Court on September 11, 1917, by a corporation engaged in the business of manufacturing machines and machine tools and having a usual place of business in Springfield, against the officers and members of two voluntary unincorporated associations known as the International Association of Machinists, Locals 214 and 682, to enjoin the defendants from unlawfully interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff.

The case was referred to a master, who filed a report, the material parts of which are described in the opinion.

The tenth paragraph of the defendants' answer was as follows:

"10. Further answering to the plaintiff's bill of complaint the defendants say that the plaintiff is a member of an association of employers who are opposed to labor organizations; that by the constitution and by-laws of said association the plaintiff is not allowed to settle any labor controversy with its employees under penalty of a fine or other punishment; that if left to its own devices and wishes the plaintiff in this case would have come to an agreement with the defendants, but that the said association through its officers or attorneys interfered in the situation without right and prevented the plaintiff by threats of boycott and



future injury to its business from dealing with and settling this dispute with the defendants."

On this matter the master made the following finding:

"Since the strike began the company has become a member of the Employers' Association of Hampden County. The principal object of this association is to render assistance to its various members and to foster the principle of the open shop. The provisions of the constitution of the association would not prevent the company from settling the strike in question, and there was no evidence that any attempt had been made to adjust it."

After the filing of the master's report a motion of the plaintiff for a temporary injunction was heard by *Callahan, J.*, who made the following interlocutory decree:

"The above entitled case came on to be heard on the plaintiff's motion for a temporary injunction after the filing of the master's report, and thereupon, upon consideration thereof, and upon hearing the parties, it is ordered, adjudged and decreed, That an injunction issue *pendente lite* to remain in force until the further order of this court or of some Justice thereof restraining the defendants individually named in the plaintiff's bill and the members of said Locals 214 and 682, their agents, servants and confederates, and each and every of them, from combining or conspiring together to interfere with the plaintiff's business for the purpose of compelling the plaintiff to maintain a so called 'closed shop,' or in any manner carrying on, aiding or abetting the said strike against the plaintiff for the purpose aforesaid; and, unless and until the defendants shall formerly renounce the purpose aforesaid and give notice to the plaintiff of such renunciation, further restraining them, their agents, servants and confederates, and each and every of them, from carrying on, aiding or abetting, in any manner whatsoever, said strike for any purpose."

After the order confirming the master's report, which is mentioned in the opinion, the defendants filed the following motion to amend their answer:

"And now come the defendants in the above entitled action and move to amend their answer originally filed therein by adding thereto the following:

"And the defendants further answering, say that the following named, all of whom are defendants in the said action, to wit,

William A. Fronk, David H. Hatch, George W. Loyd, Andrew Soitzer, Walter Worden, Fred A. Thompson, John D. Neilan, George M. Hayes, George Cloutier, Alcide Bourdear, Andrew Grimes, Leon Soland, Joseph William Allard, John J. Kinetter, William J. Bousquet, Charles Johnston, John Brobery, Leland E. Breyer, Lafayette B. Price, Clarence W. May, William J. Murphy, Charles J. Hill, Benjamin Cohan, Jno. W. Oliver, F. J. Carlin, Roy Quigley, Emil Treppe, and Fred Keating, have, since the filing of the plaintiff's bill of complaint herein, abandoned and renounced and do hereby furthermore abandon and renounce the purpose of compelling the plaintiff to maintain a so called closed shop or the said apprentice system, so called, and also the purpose of carrying on, aiding, or abetting in any manner the said strike against the said plaintiff for the said purposes aforesaid of maintaining the closed shop, so called or the said apprentice system, so called, or any other unlawful object in connection with the said strike and the maintenance thereof; and have refrained from participating and do furthermore purpose to continue to refrain from participating in the said strike for the purpose of compelling the plaintiff in any manner to maintain the said so called closed shop or the said so called apprentice system, or for any other unlawful object; and have furthermore communicated to the plaintiff the fact of their said abandonment and renunciation of all the said purposes aforesaid."

This motion was heard by *Callahan, J.*, who made an order allowing the amendment.

Both parties filed exceptions to the master's report. The defendants' third, fourth and fifth exceptions, relied upon by them, which are referred to in the opinion, were as follows:

"3. Because the finding in the second paragraph on page 10, that the provisions of the constitution of the Employers' Association would not prevent the plaintiff from settling the strike, is a conclusion of law.

"4. Because there was evidence that the plaintiff belonged to an association called the Employers' Association, the rules and by-laws of which prevented the plaintiff from dealing with his men or with the defendants without first consulting the association; that said rules and by-laws disclose the fact that the association is an illegal one and in restraint of trade and that the plaintiff

could not have come into court with clean hands; that the members of said association were assessed for the purpose of resisting strikes in the shops of the various members and that if any member of said association violated the rules or regulations they were liable to a heavy fine; that the plaintiff could not withdraw from said association; that said rules and regulations show that the plaintiff was engaged in conspiracy against the defendants; and because all of the above evidence has been ignored by the master and no finding setting forth the above facts has been made by him.

"5. Because the master allowed a witness upon a material point to refresh his recollection as to what happened some weeks before, from the memorandum made fifteen minutes before the witness testified."

The plaintiff's motion for a final decree granting a permanent injunction was heard by *Callahan, J.*, who made the following memorandum of findings of fact:

"I find that since the entry of the decree for a temporary injunction that of the defendants those whose names are signed to the letter hereinafter mentioned, members of Local No. 214 and Local No. 682, International Association of Machinists, have notified the plaintiff, by mailing to it the following letter, of their renunciation of their combination or conspiracy to interfere with the plaintiff's business, for the purpose of compelling the plaintiff to maintain a so called 'closed shop' and of their purpose of in any manner carrying on, aiding or abetting the strike declared in pursuance of said combination or conspiracy against the plaintiff for that purpose.

" 'Springfield, Mass., Nov. 22, 1917.

" 'We the undersigned members of Local No. 214 and Local No. 682 International Association of Machinists do hereby renounce and have renounced the closed shop principle, so-called, and any other unlawful object in connection with the Baush Machine Tool Co. strike and the maintenance thereof.

Wm. A. Fronk  
David H. Hatch  
Geo. W. Loyd  
Andrew Soitzer  
Walter Worden  
Fred A. Thompson

William J. Bousquet  
Chas. Johnston  
John Brobery (his mark)  
Witness John F. Jennings  
Leland E. Breyer  
Lafayette B. Price

John D. Neilan  
Geo. M. Hayes  
George Cloutier  
Alcide Bourdear  
Andrew Grimes  
Leon Soland  
Joseph Wm. Allard  
John J. Kinetter

Clarence W. May  
William J. Murphy  
Charles J. Hill  
Benjamin Cohan  
Jno. W. Oliver  
F. J. Carlin  
Roy Quigley  
Emil Treppe  
Fred Keating''

The judge ordered the entry of a final decree as follows:

"This case came on to be further heard at this sitting, and, after a finding of fact by the court, memorandum of which has been filed, was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, That a permanent injunction issue, restraining the following defendants: William A. Fronk, David H. Hatch, George W. Loyd, Andrew Soitzer, Walter Worden, Fred A. Thompson, John A. Neilan, George M. Hayes, George Cloutier, Alcide Bourdear, Andrew Grimes, Leon Soland, Joseph William Allard, John J. Kinetter, William J. Bousquet, Charles Johnston, John Brobery, Leland E. Breyer, Lafayette B. Price, Clarence W. May, William J. Murphy, Charles J. Hill, Benjamin Cohan, Jno. W. Oliver, F. J. Carlin, Roy Quigley, Emil Treppe and Fred Keating, their agents, servants and confederates, and each and every of them, from combining or conspiring together to interfere with the plaintiff's business, for the purpose of compelling the plaintiff to maintain a so called 'closed shop,' or to limit the number of apprentices it might employ in carrying on its business, or in any manner aiding or abetting the carrying on for those purposes of the strike declared against the plaintiff; restraining all other defendants, their agents, servants and confederates, and each and every of them, from carrying on, aiding or abetting, in any manner whatsoever said strike for any purpose; and restraining the persons whose names are hereinbefore mentioned from intimidating, annoying or threatening any person now or hereafter in the employment of the plaintiff, or desirous of entering the same, and maliciously inducing any persons now or hereafter in the employment of the plaintiff to leave the same, or from inducing or attempting to induce any person or persons now or hereafter in the employ-

ment of the plaintiff to break any contract of employment with the plaintiff, and from congregating in squads near the plaintiff's premises in any other than a peaceful manner."

Both the plaintiff and the defendants appealed from the decree.

The case was submitted on briefs.

*J. J. Feely*, for the plaintiff.

*F. W. Mansfield & J. F. Jennings*, for the defendants.

LORING, J. This is a bill in equity brought against the members (something over two hundred and fifty in number) of two labor unions to enjoin them "from interfering with the business of the plaintiff . . . by maintaining, carrying on, aiding or abetting in any manner the strike now in force against the plaintiff." The case was sent to a master. The master found that the members of the two unions had struck to get an increase of pay, to unionize the plaintiff's shop and to limit the number of apprentices. The plaintiff and the defendants are at issue on the legality of a strike to limit the number of apprentices. But both the plaintiff and the defendants agree that a strike to unionize an employer's shop is an illegal strike and that a strike for an increase in wages is a legal strike. Without question a strike for both a legal and an illegal purpose is an illegal strike and no contention has been made to the contrary. It is not necessary therefore to consider the legality or illegality of a strike to limit the number of apprentices and we lay that purpose of the strike on one side as a matter of no consequence.

On the coming in of the master's report a temporary injunction was issued restraining the defendants from combining for the purpose of compelling the plaintiff to maintain a closed shop "unless and until the defendants shall formally renounce the purpose aforesaid and give notice to the plaintiff of such renunciation." The temporary injunction is set forth on page 32. After this (with an exception of no importance) the master's report was confirmed. After confirmation of the master's report the "defendants" moved "to amend their answer" by alleging that twenty-eight of the defendants (named in the motion to amend) have renounced the purpose of compelling the plaintiff to unionize his shop and also the purpose of aiding the strike against the plaintiff for that purpose. The motion to amend is set forth in full on pages 32, 33. The motion to amend was allowed against the objection of the

plaintiff. Thereafter a judge of the Superior Court found that twenty-eight defendants had "notified the plaintiff by mailing to it" a letter dated November 22, 1917, and signed by them "of their renunciation of their combination or conspiracy to interfere with the plaintiff's business" for the purpose of unionizing the plaintiff's shop, and of their purpose of aiding or abetting the strike against the plaintiff for that purpose. The letter was made a part of the finding and was in these words: "Springfield, Mass., Nov. 22, 1917. We the undersigned members of Local No. 214 and Local No. 682 International Association of Machinists do hereby renounce and have renounced the closed shop principle, so-called, and any other unlawful object in connection with the Baush Machine Tool Co. strike and the maintenance thereof." Later on a final decree was entered permanently enjoining the twenty-eight defendants who signed this letter from interfering with the plaintiff's business for the purpose of compelling it to maintain a closed shop or to limit the number of apprentices "or in any manner aiding or abetting the carrying on for those purposes of the strike declared against the plaintiff; [and] restraining all other defendants . . . from carrying on, aiding or abetting, in any manner whatsoever, said strike for any purpose." The decree is set forth in full on page 35. From this decree appeals were taken both by the defendants and by the plaintiff.

By allowing the amendment to the answer the judge permitted twenty-eight of the two hundred and fifty defendants to sever and set up a defence different in part from that set up by the remaining two hundred and twenty-two. This aspect of the case was ignored by the defendants' counsel in the form of his motion to amend and in the appeal which was taken by him from the final decree.

The contention made in behalf of the twenty-eight is that on the record it must be taken that the judge was satisfied that they had renounced any purpose of continuing parties to the strike so far as the strike was for the purpose of unionizing the plaintiff's shop and that being so that they should not have been enjoined from participating in the strike for that purpose. In other words the contention in behalf of these twenty-eight defendants is in effect that they have ceased to be parties to any illegal strike and therefore ought not to have been enjoined as they were enjoined from

doing the thing which they had renounced an intention of doing. We are of opinion that there would be no answer to the contention if the premises on which it is based had been true. But they are not true.

In the first place it is to be observed that the finding made in the Superior Court falls short of what the twenty-eight defendants contend that it is. All that the judge found was that these twenty-eight defendants had "notified the plaintiff by mailing to it" (their letter dated November 22) that they "renounced the closed shop principle so called, and any other unlawful object in connection" with the pending strike. That is a guarded finding and does not go as far as the twenty-eight defendants contend that the judge's finding went.

What the twenty-eight defendants did was done pursuant to the scheme which first made its appearance in the temporary injunction. It was there provided that the temporary injunction should continue in force "until the defendants shall formally renounce the purpose" "of compelling the plaintiff to maintain a so called closed shop." By the terms of this provision it was not contemplated that the defendants who renounced the purpose of compelling the plaintiff to maintain a closed shop should renounce their membership in the union. There were two unions, but for convenience we speak of one union and of the defendants as members of the union. On the record it must be taken that the twenty-eight defendants (who took advantage of this provision in the temporary injunction by giving notice of their renunciation of the illegal purpose of the strike) did not in fact leave the union. Furthermore it was not contemplated as part of the scheme put forward in the temporary injunction that the illegal strike which had been called and which was then being conducted and maintained by the union should come to an end. It was contemplated on the other hand that it should continue in force. Finally under the notice of renunciation which was given by the twenty-eight it was contemplated that the illegal strike called and maintained by the union should continue in force and it did continue in force.

What then was the situation which came into existence by reason of the notice of renunciation by these twenty-eight members of the union who did not leave the union and who contemplated that in

spite of their renunciation of the illegal purpose of the strike the illegal strike of the union would continue in force?

In the first place so long as the union continued the illegal strike and these twenty-eight defendants continued to be members of the union, the money of the union (which was their money as well as the money of the other two hundred and twenty-two members of the union) could be used by the union in paying strike benefits, for example, or in any other way for the purpose of furthering the illegal strike. More than that since the twenty-eight defendants were to continue members of the union they could be disciplined in any way in which a majority of the union could legally discipline its members in order to further the union's illegal strike which it was contemplated should continue in force. For example: The twenty-eight defendants since they were still members of the union could be assessed to raise money to pay strike benefits to those out of work because engaged in this illegal strike in case and when the then present funds of the union should have been exhausted.

What then is the result of the twenty-eight having "renounced the closed shop principle, so called, and any other unlawful object" of the illegal strike of the union of which they were and were to continue to be members? Suppose that at the time when the question of strike or no strike was before the union originally the twenty-eight had voted to strike for an increase in wages only and the other two hundred and twenty-two had voted to strike for that and the unionizing of the plaintiff's shop. And suppose that on this vote being announced the twenty-eight had stated that they elected to remain members of the union and also stated that so far as they were concerned they should take part in the illegal strike (voted for by the two hundred and twenty-two) only for the purpose of securing an increase of pay. What would that have amounted to? It would have been nothing more than a statement of the motive which actuated the twenty-eight in remaining members of the union and so of necessity parties to the illegal strike called and maintained by the union. The motive of the twenty-eight in being parties to the illegal strike would have been of no consequence. Their liability is determined by the character of the strike not by their motive in electing to be parties to that strike; their liability is determined by the fact that they elected to remain



parties to an illegal strike and not by their motive in doing so. See, for example, in this connection *Berry v. Donovan*, 188 Mass. 353, 356, where it was said: "An intentional interference with such a right [the right of a plaintiff to have the benefit of his contract], without lawful justification, is malicious in law, even if it is from good motives and without express malice." The subsequent renunciation made by the twenty-eight defendants of "the closed shop principle, so called, and any other unlawful object" of the illegal strike, called and then maintained by the union of which they were and were to continue members and to which (illegal strike) by reason of the fact that they elected to continue members of the union they were of necessity parties, was nothing more than a statement of their motive in remaining parties to the illegal strike. A party to a strike which is illegal because it is a strike to unionize a shop as well as to get higher wages is a party to an illegal strike although so far as he is concerned he either became or continued a party to it only to get an increase of pay. The twenty-eight wanted a legal strike for an increase of pay only. That is plain. It is plain also that they wanted to get out of the illegal strike then being maintained by the union of which they were members. But they did not want to leave the union. To get out of the strike and to keep in the union they hit upon the novel scheme of renouncing the illegal purpose of the strike. But that was a futile proceeding, being, as it was, nothing more than a statement of their motive in continuing members of the union and so of necessity parties to the illegal strike. It had no effect upon their liability as parties to the strike and in the final decree no distinction should have been made between the twenty-eight and the two hundred and twenty-two members of the two unions here in question.

In addition to the contention of the twenty-eight which we have just dealt with the defendants rely on the third, fourth and fifth exceptions to the master's report set forth on pages 33, 34.

Their contention as to the third exception is that the finding there attacked is a conclusion of law. The rule to the master in the case at bar directed him to "make report of the facts." Under that form of a rule a master should not state conclusions of law. *Cook v. Scheffreen*, 215 Mass. 444, and cases there collected. The terms of the constitution of the Employers' Association are not before us. Under these circumstances we cannot say that the finding

is a conclusion of law. It is not improper to add that it would not help the defendants if the exception were sustained and this finding were stricken from the report.

The master in his report does not state that the evidence referred to in the fourth exception was introduced before him. An exception to a master's report must be founded on matters which appear on the face of the report. *Cook v. Scheffreen*, *ubi supra*, and cases there collected. This exception rests on the assertion of counsel only. For that reason it must be overruled.

The fifth and last exception is disposed of by the cases already cited in which it has been decided that an exception must be based on matters appearing on the face of the master's report and that an exception resting on the assertion of counsel is not well taken.

The defendants made a motion to recommit the case to the master "for the reasons set forth in their exceptions." For all that appears the judge who heard this motion went into evidence as to the truth of the facts on which this motion was based and found that they were not true. Apart from that the motion is addressed to the discretion of the judge and there is nothing to show that there was an abuse of discretion in denying this motion. See, for example, *Warfield v. Adams*, 215 Mass. 506; *American Circular Loom Co. v. Wilson*, 198 Mass. 182; *Barnett v. Rosenberg*, 209 Mass. 421; and *Smith v. Lloyd*, 224 Mass. 173.

As the strike was an illegal one, it is not necessary to consider whether the means employed by the defendants were lawful or unlawful.

A part of the final decree is right in substance but that part is wrong in form. The rest of it is wrong in both.

The result is that the interlocutory decree overruling the exceptions taken to the master's report, refusing to recommit the case to the master and confirming that report must be affirmed. The final decree must be reversed and a decree entered perpetually enjoining the defendants and their servants, agents and attorneys and each and all of them from combining to interfere with the business of the plaintiff by carrying on, aiding or abetting the strike called in August, 1917, by local Unions 214 and 682 of the International Association of Machinists; and it is

*So ordered.*

JULIA B. SMITH *vs.* CHARLES E. COTTING & another, trustees, & others.

Suffolk. March 5, 1918. — July 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Estoppel.* Trust, Assent by beneficiary to probate account. *Capital and Income.* Corporation, Stock dividend. *Equity Jurisdiction,* For an accounting. *Words,* "Surplus."

A beneficiary entitled to the income from a trust fund by assenting in writing to the allowance of a probate account of the trustees of the fund, in which certain shares of capital stock are enumerated among the securities constituting the principal of the trust fund, is not estopped from contending in a suit in equity against the trustees that the dividend by which the shares of stock were acquired was income to which the beneficiary was entitled, if the beneficiary when assenting to the allowance of the account had no knowledge of the transactions resulting in the acquisition of the shares by the trustees.

The stockholders and the directors of a trust company incorporated under the laws of this Commonwealth, which was authorized by statute to consolidate with certain other trust companies and for this purpose to increase its capital stock, voted to increase the capital stock of the company by issuing new shares to be paid for in cash at par to the amount of \$2,500,000, and also voted to "pay an extra cash dividend" of \$2,500,000 "out of surplus which stockholders may apply if they so desire in payment of new stock," and voted to issue the new stock at par to stockholders of record who were entitled thereto. These proceedings were designed "to accomplish substantially the same result as a stock dividend," trust companies being prohibited from making stock dividends by R. L. c. 116, § 5, which provides that "no shares shall be issued until the par value of such shares shall have actually been paid in in cash." Separate warrants were sent to the stockholders respectively entitled "extra dividend warrant" and "stock subscription warrant." A stockholder could sign the subscription warrant if he elected to take the stock or could use the dividend warrant if cash was preferred. Trustees holding shares of the stock of this trust company signed the stock subscription warrant and added the new shares thus acquired to the capital of the trust fund. The beneficiary entitled to the income from the fund brought a suit in equity against the trustees to compel them to account for the dividend as income to which the plaintiff was entitled. *Held*, that when the cash dividend was declared the surplus out of which it was to be paid became income for the use of the stockholders, and that the defendants were accountable to the plaintiff for the money thus received by them and applied to the purchase of the additional shares of stock allotted to them.

The trust company above described previously had purchased six thousand shares of the capital stock of another trust company because "it seemed necessary to control" such other trust company "in order to prevent its conduct in a manner which might be prejudicial to the interests of the" trust company that bought it.

Later, St. 1914, c. 504, § 1, was passed, providing that after January 1, 1918, "it shall be unlawful for a trust company to hold more than ten per cent of the capital stock of any other trust company." After the passage of this statute the directors of the principal trust company passed a vote, reciting that the surplus of the company of \$8,000,000 included six thousand shares of the capital stock of the other trust company which, according to the statute mentioned, it eventually would be unlawful for the company to continue to hold, and that it was desirable to distribute these six thousand shares "among the stockholders of this company in proportion to their respective holdings," and voting "That a dividend of 6,000 shares" of the other trust company "now held in the surplus of this company be declared to stockholders of record of this company" on a day named by the distribution to them on a certain day of the shares of the other trust company "in the ratio to their holdings of one to ten." The directors further voted "That \$2,000,000 out of the book value of said six thousand shares be charged to surplus account and that the said surplus be fixed at \$6,000,000; and that the balance of said book value be charged against undivided profits." *Held*, that this dividend was not in any sense a partial distribution of the capital of the trust company declaring it, and that, where shares of that trust company were held by trustees, the shares received as a dividend should be delivered to the beneficiary for life as income and not be added to the capital of the trust fund.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 29, 1917, by the beneficiary for life entitled to receive the income from a trust fund held by the defendants Cotting and Dexter under a deed of trust recorded with the Suffolk deeds, setting forth the facts which are stated in the opinion, and praying (1) that the trustees may be ordered to account to the plaintiff for a cash dividend of \$9,400 as income of the trust fund, and to pay over the same to her, or to turn over to her her share of the ninety-four shares of stock of the Old Colony Trust Company bought by them with such cash dividend or so much of these as represent such cash dividend; (2) that the trustees may be ordered to account to her for the dividend of twenty-two and six tenths shares of stock of the American Trust Company as income of the trust fund, and to pay over the same to her and (3) for further relief.

The case came on to be heard before *De Courcy, J.*, who at the request of all the parties reserved it upon the pleadings and an agreed statement of facts, so far as these might be found to be competent and material, for determination by the full court, such order to be made as justice and equity might require.

*J. W. Smith, (J. T. Wheelwright with him,)* for the plaintiff.

*B. E. Eames, (W. C. Rice with him,)* for the defendants.

BRALEY, J. The plaintiff is entitled for life to the income of a fund created by a deed of trust under which the defendants Cotting and Dexter are trustees, while the other defendants take the principal at her death. A part of the fund having been invested in stock of the Old Colony Trust Company, referred to herein as the corporation, which increased its capital by issuing a certain number of new shares at par, and also declared a cash dividend exactly equivalent to the increase which the trustees who subscribed for their proportion of the new stock used in payment, the first question is whether the plaintiff is entitled to the amount as part of the income.

We find no occasion for special comment on the objections to the competency as evidence of statements found in certain paragraphs of the agreed statement of facts, all of which with the exception of the program laid out by "one of the vice-presidents of the company," and the method adopted by the corporation in dealing with trusts controlled by it, were admissible under *Hemenway v. Hemenway*, 181 Mass. 406, *Gray v. Hemenway*, 212 Mass. 239, and *Talbot v. Milliken*, 221 Mass. 367, 368. The defendants contend that the plaintiff is estopped from maintaining the bill, because without protest she assented to the twelfth account of the trustees enumerating as among the securities the ninety-four shares of the new stock. But it properly could be shown that she had no knowledge of the transactions leading to the acquisition of the shares, and having been innocently misled by the form of the statement, she can demand a full accounting, which necessarily raises the questions presented by the record. *Bennett v. Pierce*, 188 Mass. 186.

By St. 1903, c. 416, the corporation was authorized to increase its capital stock to a certain amount "in such manner and upon such terms and conditions as the stockholders . . . may determine: provided, that no certificate of shares shall be issued until the par value of such shares shall have been paid in in cash. . . ." But St. 1911, c. 128, §§ 1, 2, authorized the corporation to merge with three other trust companies, the merger to become effective only "when the terms thereof have been approved, at meetings called for the purpose, by votes of at least two thirds in interest of the stockholders of each of the contracting trust companies," and by § 4, to "increase its capital stock to the aggregate amount

of the authorized capital stocks of its constituent corporations, subject to the provisions of chapter one hundred and eighty-nine of the acts of the year nineteen hundred and five." The St. 1905, c. 189, provides that a trust company subject to the approval of the commissioner of savings banks may increase its capital to the maximum amount allowed by R. L. c. 116, § 5, in the manner provided for business corporations under St. 1903, c. 437, but "no such stock shall be issued by any trust company until the par value thereof shall be fully paid in in cash." While St. 1905, c. 189, is repealed by St. 1916, c. 37, § 2, it is under the authority conferred by St. 1911, c. 128, that the directors on June 6, 1911, voted to recommend to the stockholders to accept the act and to increase the capital "to seven and a half million dollars . . . being the aggregate amount of the authorized capital stocks" of the trust companies named in the statute, and to issue to stockholders after such merger is completed \$2,500,000 par value of the new stock of the corporation "for cash at par." The directors then recommended that before the issue of the new stock "an extra cash dividend of one hundred dollars . . . per share, being" \$2,500,000 "be paid to such stockholders" by the corporation "out of surplus." The stockholders at their meeting duly held voted to accept the statute, and the terms of the merger agreed upon by the respective boards of directors, which had been approved by the bank commissioner who had succeeded to the powers and duties of the board of savings banks commissioners, and also voted to increase its capital stock to be paid for in cash at par leaving "the time, terms and manner of the issue . . . and of the payment" to be fixed by the directors, all new stock not taken by the stockholders to be sold for cash at not less than par at such time or times and in such manner as the board might determine. The directors, who alone had power to declare dividends, voted at a subsequent meeting with the record of the meeting of the stockholders before them, and after it had been suggested that the corporation "pay an extra cash dividend out of surplus which stockholders may apply, if they so desire, in payment for new stock," and that the surplus consisted in part of "an accumulation of earnings or profits; and in part paid in as the result of the issue of stock at prices above par," which amounted to more than the par value of the new stock, to issue the new stock at par to the

stockholders of record who were entitled thereto, and fixed the date at which the right to subscribe, and the time of payment would expire. A further vote was passed, that "an extra cash dividend of one hundred dollars . . . per share, payable not out of accumulated earnings but out of paid in surplus . . . resulting from the issue of stock . . . from time to time at prices above par, be and the same is hereby declared out of the said surplus, such dividend to be payable" to the stockholders at a certain date, being the time named in the previous vote for the final payment of subscriptions to the new stock. The agreed facts state that these proceedings were designed "to accomplish substantially the same result as a stock dividend." But trust companies are expressly prohibited from making stock dividends by R. L. c. 116, § 5, from which provision the corporation is not exempted by St. 1911, c. 128. And under the vote of the directors the dividend is designated as a cash dividend. It is plain that the distribution cannot be deemed as comprising both stock and cash, a stock dividend to share owners who chose to take stock, and a cash dividend to those who chose to take money. And whatever the intention of the directors may have been they could not determine the question whether as between the parties the dividend is capital or income. *Heard v. Eldredge*, 109 Mass. 258, 260. Nor can the dividend be called a mere form as in *Rand v. Hubbell*, 115 Mass. 461, 477, where the directors voted, that the dividend must be applied in payment for new stock simultaneously created. The money having been deposited in a national bank, separate warrants were sent to the stockholders respectively entitled extra dividend warrant, and stock subscription warrant, which they could indorse if they elected to take stock, or use the dividend warrant if cash was preferred. A stockholder accordingly had the option to use either warrant, and he was not bound legally or morally to take stock rather than cash in payment. *Davis v. Jackson*, 152 Mass. 58. *Lyman v. Pratt*, 183 Mass. 58. *Hyde v. Holmes*, 198 Mass. 287.

The answers however aver, and the agreed facts state, that the dividend was "declared and paid out of the paid in surplus . . . resulting from the issue of stock . . . from time to time at prices above par." It is contended that even if the trustees had accepted cash, the dividend actually represented a capitalization of permanent assets, and therefore it would not have been income. *Hemen-*

*way v. Hemmway*, 181 Mass. 406, 408. *D'Ooge v. Leeds*, 176 Mass. 558, 561. It does not appear from the record that a premium of some amount was paid to the corporation on every share issued before the dividend in question was declared, and no fixed or minimum premium ever was required on each share issued. Whatever might be said as to premiums paid on shares originally issued, it is obvious, that the very large premiums received by the corporation on some subsequent issues were paid not as capital, but for the right to share in the profits, surplus, and other earnings which had been accumulated and remained undistributed. Nor was any vote ever passed setting aside a definite portion of the surplus as a permanent fund for additional security in the nature of capital. The effect of such a vote need not be considered. See *D'Ooge v. Leeds*, 176 Mass. 558, 562. We find nothing which would have prevented the corporation by appropriate votes from using this surplus, profit and loss, undivided profits, or however the premiums may be designated, for any legitimate purpose. Not having been segregated as capital it could be appropriated for the payment of dividends, and cases like *Adams v. Adams*, 139 Mass. 449, 452, do not support the contention of the defendants. The incorporators expressly voted that the premium on the first issue of stock should be directly entered in the surplus account to which was added the premium received on another and later issue of stock, while all other premiums received as the capital was increased from time to time were credited to profit and loss account. The corporation carried on its books a capital account including only its authorized capital stock, a surplus account, and a profit and loss account, in which all moneys received from current earnings, profits of every nature including premiums on sales of stock above par with the exceptions above stated, were credited, but "no separate account of premiums was kept." The "premiums on shares of stock sold" which appear in two items taken from the profit and loss account where they are thus designated, were transferred directly to the surplus account, making it more than sufficient to meet the requirements of the dividend. While the trustees held two hundred and twenty-six shares, it does not appear that they ever paid any premium to the corporation.

But, even if it be assumed that a premium was paid by them, or by the original stockholder or stockholders under whom they



derive title, no distinct and inherent right to reimbursement, or separate interest in the surplus had been acquired. It could be dealt with by the corporation as a fund derived from the business. *Balch v. Hallett*, 10 Gray, 402, 404. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. *Davis v. Jackson*, 152 Mass. 58. *Talbot v. Milliken*, 221 Mass. 367. The words "premium," "surplus," and "undivided profits" appearing in the record are terms of banking descriptive of net earnings, income and moneys from whatever source derived. *Hemenway v. Hemenway*, 181 Mass. 406. *Union Pacific Railroad v. United States*, 99 U.S. 402. The word "surplus" also is generally understood as meaning a fund which is no longer needed. *Hyatt v. Allen*, 56 N. Y. 553, 556. *Williams v. Western Union Telegraph Co.* 93 N. Y. 162. And a dividend declared therefrom ordinarily and legally imports its distribution among stockholders. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400, 404. *Park v. Grant Locomotive Works*, 13 Stew. 114. The separation of "premiums on shares of stock sold" from the profit and loss account worked no transformation. If by reason of the apparent prospect of great financial success the corporation not only at its inception but subsequently was enabled to sell its stock for more than par, the money obtained as has been said was not an accretion of the fundamental capital, which could be increased only in the manner provided by statute. It represents a portion only of treasury assets in the nature of gains, or profits, which the corporation could distribute without reducing the value of its remaining property below the par value of the entire capital stock including the proposed increase, or impairing its resources which remained amply sufficient for the satisfaction of all indebtedness. *Balch v. Hallett*, 10 Gray, 402. *Hemenway v. Hemenway*, 181 Mass. 406. *Gray v. Hemenway*, 223 Mass. 293. The result of course, if the surplus were legally capitalized in the form of new stock, would be that, instead of being carried on the corporation's books as surplus, the amount in the form of outstanding shares of new stock would be charged to the account of capital. It still retained the ownership and power of control. A distribution however in the form of cash would make the dividend the separate property of the stockholders. And, the dividend in question having been an actual setting apart by a valid vote of a part of the sur-

plus funds, became the property of the stockholders distributively. It would not have passed to a purchaser if after the dividend was declared the trustees had sold their old stock with the accompanying rights to subscribe for new stock unless the contract of transfer had so provided. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 177. *Foote, appellant*, 22 Pick. 299.

The corporation undoubtedly could have retained the surplus undiminished under whatever name denoted, yet, having made and issued warrants for a partial distribution in cash, it thereupon became income for the use of stockholders. The earlier cases of *Rand v. Hubbell*, 115 Mass. 461, and *Daland v. Williams*, 101 Mass. 571, referred to by the defendants are plainly distinguishable for reasons sufficiently pointed out in *Davis v. Jackson*, 152 Mass. 58.

If the trustees had taken cash and had sold their rights of subscription which were very valuable as the new stock was worth more than par value, the money obtained from the sale would have been an addition to capital. *Atkins v. Albree*, 12 Allen, 359, 362. *Hyde v. Holmes*, 198 Mass. 287, 293. But, being accountable for all net income derived from investments, they are chargeable with the amount applied in purchase of their allotment of additional stock. *Davis v. Jackson*, 152 Mass. 58, 60. *Hemenway v. Hemenway*, 181 Mass. 406. *Lyman v. Pratt*, 183 Mass. 58. *Hyde v. Holmes*, 198 Mass. 287. *Gray v. Hemenway*, 212 Mass. 239. *Gardiner v. Gardiner*, 212 Mass. 508, 511, 512. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 177. *Tax Commissioner v. Putnam*, 227 Mass. 522, 533.

The second question relates to the distribution of six thousand shares of the capital stock of the American Trust Company, purchased by the corporation because "it seemed necessary to control the American Trust Company in order to prevent its conduct in a manner which might be prejudicial to the interests of the Old Colony Trust Company." The St. of 1914, c. 504, § 1, having provided that, "After January first, nineteen hundred and eighteen, it shall be unlawful for a trust company to hold more than ten per cent of the capital stock of any other trust company," the directors on December 15, 1914, after entry upon their records of the following preamble, "Whereas the company has a surplus account amounting to \$8,000,000, and whereas

among the investments of the company are shares of the capital stock of the American Trust Company, a Massachusetts corporation, and, according to chapter 504 of the acts of Massachusetts Legislature for the year 1914, it will eventually be unlawful for this company to continue to hold all of said shares, and whereas in the opinion of this board it is desirable to distribute 6,000 of said shares among the stockholders of this company in proportion to their respective holdings, Voted: That a dividend of 6,000 shares of the American Trust Company now held in the surplus of this company be declared to stockholders of record of this company at the close of business on December 31, 1914, and paid by the distribution to them on January 15, 1915, of shares of the American Trust Company stock in the ratio to their holdings of one to ten." And, after directing the preparation of proper warrants for distribution and for the adjustment of fractional shares, they further voted, "That \$2,000,000, out of the book value of said 6,000 shares be charged to surplus account and that the said surplus be fixed at \$6,000,000; and that the balance of said book value be charged against undivided profits." A card enclosed in the letter in which the stock was transmitted to stockholders recited, that the "shares distributed have not been charged against earnings, but has been charged . . . against surplus and undivided profits accounts which have accrued through sales of stock of Old Colony Trust Company at a premium." But the action of the directors controls, and not the subsequent interpretation of the vote apparently adopted by some officer of the corporation. It is certain that this dividend is not in any sense a partial distribution of the corporation's capital, but consisted solely of shares of another and distinct domestic organization whose existence has not been terminated. *United Zinc Co. v. Harwood*, 216 Mass. 474. The corporation was not in process of liquidation. The dividend was a division among the owners of shares the existence of which was to continue, of profits, or increase from investments in the stock of another company. It was not a distribution of property preparatory to dissolution and winding up of the business as in *Gifford v. Thompson*, 115 Mass. 478, 480, and *Brownell v. Anthony*, 189 Mass. 442, or a capitalization of undivided assets, or a dividend in the form of bonds bearing interest issued on a fund of accumulated earnings put in trust by the corporation "to protect the share-

holders and provide for losses," as in *D'Ooge v. Leeds*, 176 Mass. 558, where the bonds were held to be capital because they were like an issue of preferred stock. The stockholders had the same fractional interest as before in the corporate capital, which had not been impaired. We are accordingly of opinion that it should be assimilated to and treated as a cash dividend. *Harvard College v. Amory*, 9 Pick. 446. *Balch v. Hallet*, 10 Gray, 402. *Rand v. Hubbell*, 115 Mass. 461, 476. *Gray v. Hemenway*, 212 Mass. 239. *Talbot v. Milliken*, 221 Mass. 367. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175. *Green v. Bissell*, 79 Conn. 547. *Gilkey v. Paine*, 80 Maine, 319. *In re Rogers*, 161 N. Y. 108. The trustees are accountable to the plaintiff for these shares as well as for the proceeds of a fractional share which they sold.

A decree in conformity with the opinion is to be entered, the terms of which are to be settled before a single justice. *Southard v. Southard*, 210 Mass. 347, 359.

Ordered accordingly.

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LILLIAN A. DRAPER vs. CHARLES E. COTTING & another,  
trustees.

JOHN J. CALLAHAN vs. SAME.

CHARLES E. CALLAHAN vs. SAME.

PATRICK J. HARTNETT vs. SAME.

EDWARD DRAPER vs. SAME.

Suffolk. December 7, 1917. — September 11, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

*Negligence*, Of one controlling real estate, In maintaining elevator, Safety device, *Res ipsa loquitur*. *Elevator. Landlord and Tenant. Practice, Civil*, Judge's charge.

In an action against the owner of an office building for personal injuries sustained when in a passenger elevator in the building maintained and controlled by the defendant, there was evidence that the plaintiff, having completed certain business with a tenant on the tenth floor of the building, entered the elevator on that floor to descend to the street, that the operator started the car, which thereupon shot downward with "great violence," inclining to one side and stopping at a point near the third floor, where it substantially was

wrecked, that the elevator had been in use for twelve years or more and that it never had been inspected to ascertain whether the instantaneous safety device, with which it was equipped and which was designed to act with equal restraining power simultaneously upon rails on each side of the elevator well, remained in an effective working condition to ensure the safety of passengers, and that whether the safety device was in proper working order could be ascertained only by an examination of the entire apparatus. There also was evidence on which it could have been found that the elevator would not have fallen in the way that it did unless its appliances had been "out of order in respects which could have been discovered by reasonably careful inspection." *Held*, that the plaintiff was entitled to go to the jury.

In the case above described it also was *held* that evidence properly was admitted on which it could have been found that the safety device was an obsolete and improper appliance, because an improved safety device had been in common use for a considerable period before the accident, by the adoption of which the accident would have been avoided.

In the same case it was *held* that the defendant, while not required to use any particular appliance, was bound to exert every reasonable effort to secure safety.

In the same case there was evidence warranting a finding that a defect in the type of safety device attached to the elevator could "only be discovered by a careful inspection of the mechanism at the top of the elevator well and on the bottom of this car made by a person familiar with the construction and operation of elevators." *Held*, that, if it were found that the device was defective, it also could be found that the defect was a hidden one as defined in *Andrews v. Williamson*, 193 Mass. 92, for which the defendant would be responsible.

In the same case it was *held* that an instruction rightly was given to the jury to the effect that the defendant was bound to use ordinary care to ascertain whether the safety device was reasonably safe for the purposes for which it was designed and intended and thereafter to see that it was maintained in a reasonably safe condition.

In the same case it was *held* that an instruction rightly was given to the jury to the effect that, if the elevator was apparently safe when the tenant, with whom the plaintiff had been transacting business, began its occupancy, it was the duty of the defendant as landlord to use reasonable care to keep it safe, and, if the elevator was in fact unsafe at the time when it was apparently safe, it was the defendant's duty as landlord during the occupancy of the tenant to put the elevator in a safe condition and to use reasonable care to keep it so.

In the same case the defendant introduced in evidence a portion of the regulations of the board of elevator regulations relating to the installation of speed governors connected with safety devices of power elevators and showed that the defendant had installed such speed governors, and it was *held*, that the jury rightly were instructed that the question was not, whether the defendant had complied with these regulations, but, whether the device used, when properly connected with the speed governor, was reasonably safe.

In the same case it was *pointed out* that, whether the defendant had used due care in his relation to the plaintiff, was a question of fact on all, and not on a portion, of the evidence.

In the case above described the presiding judge refused to rule that the doctrine of *res ipsa loquitur* had no application to the case, and instructed the jury as follows: "If, according to your experience, you find that an accident or an event such as this does not ordinarily happen except through negligence on the

part of the persons having control of the elevators, and who have charge of them, then you may infer from the happening of the accident itself that it was caused by the negligence of the persons having control of the elevators, even although you are unable to point out and specify in what particulars that negligence exists." *Held*, that both the refusal of the ruling requested and the instruction given were right.

In the same case it was *said*, "The jury well could find that, while it [the elevator] was being used in the customary manner, its collapse and partial demolition occurred, and this fact of itself until explained was sufficient for the application of the doctrine" of *res ipsa loquitur*.

In the same case it was *said*, "The accuracy of the charge as an exposition of the law applicable to the essential issues of fact is to be determined from all the judge said, and not from detached portions of the charge."

In the same case it was *held* that the jury rightly were instructed as follows: "Merely because the instantaneous device operated and operated in the way in which it was intended to operate and thus prevented more serious injury from happening than did happen, in this particular case, it would not absolve the defendants from blame if they were negligent in causing the safety device to come into operation."

A presiding judge may use illustrations for the purpose of more pointedly directing the attention of the jury to the questions they are to decide. This is a matter of discretion, not to be reviewed unless prejudicial error positively is shown, and none was held to have been shown in the present case.

FIVE ACTIONS OF TORT against the owners, as trustees, of an office building numbered 101 on Tremont Street in Boston called the Paddock Building, the first four actions being for personal injuries sustained by the respective plaintiffs on July 9, 1915, while in a passenger elevator in the building, and the fifth being by the husband of the plaintiff in the first case for expenses incurred on account of the injuries sustained by his wife. Writs dated June 8, 1916, August 13 and December 18, 1915, and August 30, 1916.

In the Superior Court the cases were tried together before *Chase, J.* The evidence and the exceptions taken at the trial to the admission of certain evidence are described in the opinion. At the close of the evidence the defendants asked the judge to order verdicts for them in each of the cases. The judge refused to do this, and thereupon the defendants asked the judge to make the following rulings, besides others that were made by the judge as requested:

"4. If at the commencement of the tenancy of the tenant, the Workingmen's Co-operative Bank, the elevator in question was equipped with the instantaneous type of safety device, the defendants as landlords owed no duty to change that type of safety de-

vice; to that extent at least the tenant took the premises as it found them.

"5. If at the commencement of the tenancy of the tenant, the Workingmen's Co-operative Bank, the elevator in question was equipped with the instantaneous type of safety device, and if the jury believe that, even though that type of safety device is properly adjusted, it may work unevenly in the sense that one side catches on the guide rail before the other, the defendants are guilty of no breach of duty in the use of such type of safety [device].

"6. If at the commencement of the tenancy of the tenant, the Workingmen's Co-operative Bank, the elevator in question was equipped with the instantaneous type of safety device, the defendant landlords owed no duty to change that type of device for another type, as for example, the compression type, even though the jury may believe that the instantaneous type of safety device was unsuitable for an elevator such as was elevator No. 4.

"7. In any event, if the jury believe that the elevator in question was installed by a reputable dealer in elevators and when so installed was equipped with such safety devices or other apparatus as required by law, and that, after such installation, the defendants by a suitable system of inspection exercised reasonable care to keep the elevator in a reasonably safe condition, the defendants are not liable to the plaintiffs."

"9. There being no dispute that, at the commencement of the tenancy of the tenant, the Workingmen's Co-operative Bank, the elevator was equipped with the instantaneous type of safety device, the plaintiffs cannot hold the defendants responsible for any injuries arising out of the ordinary use of such type of device.

"10. If the defendants had installed upon the elevator in question such speed governors and safety devices as are called for by law, no duty existed to furnish any other governors or safety devices.

"11. The defendants owed no duty to furnish any better or safer or other safety device than that required by law, that is, by the elevator regulations framed by the board of elevator regulations.

"12. If the defendants had installed upon the elevator in question such speed governors and safety devices as were called for by the elevator regulations and if the defendants exercised a reason-

able degree of care in seeing that the elevator as thus equipped was kept in repair and suitable condition for safe operation, the defendants discharged their full duty."

"14. If the jury believe that the plaintiffs' accident came about because the safety device operated as it would reasonably be expected to operate, no liability attaches to the defendants.

"15. It is only in case the jury believe that the accident to the plaintiffs happened because the defendants failed to exercise reasonable care in keeping the elevator with its devices as actually installed at the commencement of the tenancy of the tenant, the Workingmen's Co-operative Bank, in the condition in which it then was or appeared to be, that the defendants are liable.

"16. If the jury believe that the safety device was tripped for some reason which could not be discovered by a reasonably careful inspection, no liability attaches for injuries resulting from the operation under such circumstances of the safety device.

"17. The doctrine of *res ipsa loquitur* has no application to the case at bar.

"18. The plaintiffs may rely upon the doctrine of *res ipsa loquitur* only if the jury believes that they have made an unsuccessful attempt to prove by direct evidence the precise cause of the accident.

"19. The defendants' duty in respect to the elevator in question is that of due care, to keep it in such condition as it was in or purported to be in at the time of the letting, but they are not bound to change the mode of construction.

"20. If, at the time of the letting, the elevator was equipped with the instantaneous type of safety device, the defendants were not bound to change that mode of construction and substitute some other form of safety device."

"22. If the jury believe that over a course of years from 1901 or 1902 to 1915 the elevator in question had safely carried thousands of passengers, making daily in the vicinity of three hundred safe round trips, the jury are warranted in believing that the defendants have furnished a reasonably safe elevator.

"23. If the jury believe that before the accident to the plaintiffs the elevator had been daily in constant successful operation, without accident or any interruption which would reasonably cause apprehension of any imperfection in device or safeguards against



accident, the jury are warranted in believing that the defendants have furnished a reasonably safe elevator."

The judge refused to make any of these rulings except so far as they were embodied in his charge to the jury, the material parts of which are described in the opinion. The defendants excepted "to that part of the charge which submits to the jury on the evidence the fact, as bearing upon the defendants' negligence, that there were other devices for cars for high rates of speed which the defendants might have used."

They also excepted "to that portion of the charge which submits to the jury the question as to whether or not the defendants were exercising reasonable care in not having another form of device."

They also excepted "to that portion which left it for the jury to say whether the defendants should have discarded the old for the new, and that it was all a question of due care as to the kind of device," and "to that portion of the charge in which the jury were told that, if the device operated as intended, the defendants might still be liable."

The defendants also excepted to the "illustration about the automobile."

They also excepted "to that portion of the charge in which the jury were told that merely because the device operated as intended and thus prevented more serious injury, this would not absolve the defendants from blame if they were negligent in causing the device to be put into operation."

They also excepted to a portion of the charge to the effect that, "even if the device was in perfect operating condition and did operate and no negligence existed, and the device operated properly, if the defendants negligently caused the car to descend at such speed as to make it dangerous to operate the device, the defendants are liable."

They also excepted "to the use of the illustration dealing with the safety switch on the railroad line."

They also excepted "to that portion of the charge which says the doctrine of *res ipsa loquitur* applies."

The jury returned a verdict for each of the plaintiffs, for the plaintiff Lillian A. Draper in the sum of \$4,000, for the plaintiff John J. Callahan in the sum of \$2,500, for the plaintiff Charles E. Callahan in the sum of \$5,500, for the plaintiff Patrick J. Hartnett

in the sum of \$1,000 and for the plaintiff Edward Draper in the sum of \$150. The defendants alleged exceptions.

Another action for injuries received in the same accident is described in *Waters v. Cotting*, 227 Mass. 405.

*E. C. Stone*, for the defendants.

*R. Spring*, for the plaintiffs.

BRALEY, J. The first four plaintiffs, to whom reference hereafter will be made as the plaintiffs, sue for personal injuries suffered while riding in a passenger elevator owned and operated by the defendants, while the fifth action is brought by the husband of Mrs. Draper for expenses incurred because of the harm to his wife.

The following material facts are not in controversy: The rooms in the defendants' building, consisting of eleven stories, were let to tenants for use as offices and shops, to which access could be had by passenger elevators, over which as well as over the connecting stairways the defendants retained exclusive control. On the day of the accident the plaintiffs were in the building doing business with a co-operative bank, a tenant whose office was on the tenth floor. The business being completed, they entered the elevator for the purpose of departing from the premises, and the car was started by the operator. But, instead of descending in the ordinary way, it shot downward with "great violence," inclining to one side, causing the car to be substantially wrecked when it came to a stop at a point approximately level with the third floor. It had been installed upon completion of the building and used for some twelve years or more; but no inspection ever had been made to ascertain whether the instantaneous safety device, which was designed to act simultaneously with equal restraining force on the rails on each side of the well, remained in an effective working condition, so that the car, even when descending at a normal maximum speed of five hundred feet a minute, could be sufficiently and instantly checked so as to ensure the safety of passengers.

It is stated, that, whether the safety device was in proper working order, could be ascertained only by an examination of the entire apparatus; and, evidence having been offered from which it could be found that the elevator would not have fallen as described unless the appliances therewith connected had

been "out of order in respects which could have been discovered by reasonably careful inspection," the plaintiffs were entitled to go to the jury. *Waters v. Cotting*, 227 Mass. 405. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580, 582. *Moylon v. D. S. McDonald Co.* 188 Mass. 499. The request for a directed verdict was rightly denied.

The defendants also excepted to the admission of evidence from which the jury could find that the safety device was an obsolete and improper appliance, because an improved compression safety device had been in common use for quite a period before the accident, by the operation of which the car, if so equipped, would have come to a gradual, instead of a precipitate stop, and the accident avoided. And asked for rulings variously phrased, that, if at the date of the letting the elevator had a safety device, they were under no obligation to change the mode of construction or to substitute or provide some other or better form of mechanism, even if the substitution might have caused the car to be more stable, more easily controlled and uniformly more safe.

We consider this evidence as relating to the time when the bank became a tenant, under whose rights the plaintiffs were lawfully on the elevator, and the duty the defendants owed to the tenant measures the duty they owed to the plaintiffs. *Baum v. Ahlborn*, 210 Mass. 336. *Follins v. Dill*, 229 Mass. 321. *Marwedel v. Cook*, 154 Mass. 235, 236. *Mikkanen v. Safety Fund National Bank*, 222 Mass. 150, 153. It is not contended that the condition of the elevator is referred to in the lease, and there is evidence warranting a finding that the type of safety device attached to the elevator could "only be discovered by a careful inspection of the mechanism at the top of the elevator well and on the bottom of this car made by a person familiar with the construction and operation of elevators." If the device was defective, it also could be found to be a hidden defect for which the defendants are responsible as defined in *Andrews v. Williamson*, 193 Mass. 92. The defendants under the lease were charged with the duty of exercising due care in providing and maintaining an elevator reasonably safe for passenger service under the conditions of operation appearing in the record. *Shattuck v. Rand*, 142 Mass. 83. *Gibson v. International Trust Co.*

177 Mass. 100, 103. It was said in *Ogden v. Aspinwall*, 220 Mass. 100, 105, where the plaintiff, an employee of a tenant, suffered personal injuries while riding on a defective elevator provided by the defendants for the use of tenants, that the instructions of the trial judge, when defining the defendant's due care, that, "It must be the care which is equal and proportionate to the probable harmful consequences that may follow from the lack of its exercise," were "undoubtedly correct." The defendants therefore, while not required to use any particular appliance, were bound to exert every reasonable effort to secure safety. It is settled that where, as in the present cases, the question is whether the use of a particular kind of mechanical device or appliance by the defendant can be found to be negligent, the "possibility and the ease or difficulty of procuring something different which is safer and better are important facts bearing upon it. That something safer has been invented and is in common use is ordinarily a fact of considerable significance. Evidence of this kind is often received in such cases." *Dolan v. Boot Cotton Mills*, 185 Mass. 576, 579. The evidence was properly admitted. If the jury found that there was another, better and safer appliance in common use at the beginning of the bank's tenancy, which if installed probably would have averted the accident, they were to determine under suitable instructions, to what extent, if at all, the failure of the defendants to avail themselves of it tended to show negligence. *Myers v. Hudson Iron Co.* 150 Mass. 125, 137, 138.

The exception to the refusal to give the seventh request having been waived, the fourth, fifth, sixth, ninth, fourteenth, fifteenth, sixteenth, nineteenth and twentieth requests, except as modified and given, were rightly denied. The jury were accurately instructed in substance, that the defendants were bound to use ordinary care to ascertain whether the safety device was reasonably safe for the purposes for which it was designed and intended, and thereafter to see that it was maintained in a reasonably safe condition. *Shattuck v. Rand*, *Ogden v. Aspinwall*, *ubi supra*.

The instructions as to the effect of the tenant's acceptance of the elevator in the condition it appeared to be in, and the duty of the defendants not only to provide, but to maintain, a properly equipped elevator for the tenant's use, when operated at the

speed named, were accurate and appropriate. *Wagner v. Boston Elevated Railway*, 188 Mass. 437, 441, and cases cited. *Andrews v. Williamson*, *ubi supra*. The judge said, if the elevator was "apparently and obviously defective and such defect could or should have been seen by any of the tenants at the beginning of his tenancy, there is an implied understanding . . . that the tenant would take the elevators in the condition in which they apparently were and in the condition in which the tenants should have seen an obvious condition if such an obvious defect existed. But, if the elevators were apparently safe at the time a particular tenant took occupancy, then the landlord assumed the duty of keeping the elevators not only apparently safe, but actually safe during the course of that tenant's occupancy; and it would be no defence to the landlord if as a matter of fact the elevators were defective and dangerous by reason of the landlord's negligence, to say that the elevators at the time when an accident occurred by reason of which liability was sought to be attached to the landlord, were in the same condition at the beginning of the tenant's occupancy. If they were apparently safe when the tenant began occupancy, the landlord must use reasonable care to keep them safe; and, if they were in fact unsafe at the time when they were apparently safe, it was the landlord's duty nevertheless during the occupancy of the particular tenant to put them in a safe condition and to use reasonable care to keep them so. . . . The tenant has a right to rely on the conditions as they were apparently. If there is . . . an obvious defect . . . there is an implied understanding that the tenant takes things as they are . . . the landlord may let premises in any condition in which they happen to be and . . . he is under no obligation to change their structure and their general condition; . . . the tenant who takes them takes them in the condition in which they apparently are and cannot complain subsequently because they are not better. So then, so far as the tenants are concerned and so far as these plaintiffs are concerned, . . . if there was no reason for the tenants to believe that they were not safe, if there was no obvious condition which apparently rendered them unsafe," it was the landlord's duty "to keep the elevators in a safe condition and to use reasonable care and diligence to effect that." And when referring to the type of device used, he correctly instructed the jury, that "The

question is, whether it was a proper device, taking into account the speed at which it was adjusted to go into operation, because the whole complaint here is, as you have clearly in mind, that, because the speed of the car was so great, the checking system taking operation instantaneously, caused the car to be wrecked and caused the plaintiffs to be injured. . . . You have, of course, in considering whether or not the defendants were warranted in having this device upon the car, to consider the question of whether or not in so doing they were exercising reasonable care with reference to the safety of passengers. You may consider, as the plaintiffs ask you to, whether or not there were other devices which were adapted to effect the same purpose without danger to the occupants of the car. . . . Of course, it is true that merely by reason of the fact that a new and improved device has been invented, persons who are using an older device, which was in common use and which up to the time of the invention of the new device has been considered reasonably proper and safe, are not obliged the moment that the new device is invented to discard the old and tried device for the new and untried. It is a question of when, if a new and improved device is invented, those who have occasion to use such a device in the exercise of due care for the safety of those who may be injured in that respect are called upon to discard the old and adopt the new. It is a question of reasonableness. . . . It is all a question of using reasonable care, reasonable prudence, proper foresight, in protection of the welfare of those to whom duty is owed." *Dolan v. Boott Cotton Mills*, and *Myers v. Hudson Iron Co.*, *ubi supra*. *Hill v. Winsor*, 118 Mass. 251, 259.

The defendants introduced in evidence a portion of the regulations of the board of elevator regulations relating to the installation of speed governors connected with safety devices of power elevators, and by the tenth, eleventh and twelfth requests they asked for rulings, that, having installed such governors and safety devices "as are called for by law," they "owed no duty to furnish any better or safer or other safety device than that required by law, that is," by the regulations promulgated by the board of elevator regulations. But these regulations only required the attachment of speed governors. While the board recommended the use of the compression type, it left the choice of safety devices to the

judgment of the owner and operator. The defendants of course were bound to comply with the regulations. But the question, as the judge told the jury, under instructions sufficiently favorable, was not, whether they had complied, but, whether the device used, when properly connected with the speed governor, was reasonably safe. *Ogden v. Aspinwall, ubi supra.*

The twenty-second and twenty-third requests, that, as "thousands of passengers" had been safely transported for quite a number of years, during which the elevator had been constantly in operation without an accident or interruption, the defendants had furnished a reasonably safe elevator, could not have been given. The defendants' due care in their relations to the plaintiffs was a question of fact on all, and not a portion, of the evidence. *Gettins v. Kelley*, 212 Mass. 171.

We discover no error in the denial of the seventeenth and eighteenth requests, that the doctrine of *res ipsa loquitur* was inapplicable, or in the instructions, that, "If, according to your experience, you find that an accident or an event such as this does not ordinarily happen except through negligence on the part of the persons having control of the elevators, and who have charge of them, then you may infer from the happening of the accident itself that it was caused by the negligence of the persons having control of the elevators, even although you are unable to point out and specify in what particulars that negligence exists. That is to say, if you find that the most reasonable inference to draw from the happening of the accident itself is, according to your experience, that it happened through the defendants' negligence, then the law permits you to draw that inference if the accident is otherwise unexplained and no sufficient cause has been produced for its occurrence. . . . Of course, this rule has no operation if you find that the cause of the accident has been explained to your satisfaction by the evidence." The defendants do not contend that they intended to provide and did provide a passenger elevator to be operated at high speed unequipped with an instantaneous safety device, or that they were indifferent whether the device was in such repair that it could be depended upon in an emergency. The elevator was installed, maintained and held out to tenants as a means of transportation, the employment of which in the usual way, and under obvious conditions, did not involve or presage

according to common experience a substantial break down. The jury well could find that, while it was being used in the customary manner, its collapse and partial demolition occurred, and this fact of itself until explained was sufficient for the application of the doctrine, as amply pointed out in *Cleary v. Cavanaugh*, 219 Mass. 281, *Cain v. Southern Massachusetts Telephone Co.* 219 Mass. 504, *Feeley v. Doyle*, 222 Mass. 155, and *Souden v. Fore River Ship Building Co.* 223 Mass. 509.

The plaintiffs, as the jury were further and properly instructed, still carried the burden of satisfying them on all the evidence that the defendants were guilty of negligence. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536. The exceptions to the instructions are found in the colloquy between the court and counsel, which comprises eight quarto pages of the record. The accuracy of the charge as an exposition of the law applicable to the essential issues of fact is to be determined from all the judge said, and not from detached portions. *Adams v. Nantucket*, 11 Allen, 203. *Hamilton v. Boston Elevated Railway*, 213 Mass. 420, 423. It is unnecessary to go into details which have been fully considered in the discussion of the instructions relating to the questions raised by the requests. The defendants' obligations to the plaintiffs, and what the jury must find before they could say negligence had been proved, as well as the tenant's assumption of obvious conditions but not of concealed defects or of an elevator which could be found to have been inherently unsafe were sufficiently stated in terms in conformity with *Shattuck v. Rand*, 142 Mass. 83, *Wright v. Perry*, 188 Mass. 268, *Andrews v. Williamson*, 193 Mass. 92, and *Ogden v. Aspinwall*, 220 Mass. 100.

The defendants also excepted to certain illustrations used in connection with the instructions as to their liability, if they were found to have been negligent, although the consequences from the elevator's fall were less disastrous than they might have been if it had not been equipped with a safety device. The instructions were as follows: "The safety device was intended to prevent the car dropping to the bottom of the well. If the safety device was caused to operate through negligence of the defendants, the fact that the safety device, considering its operation solely by itself, operated as it was intended to operate and properly, would not absolve the defendants. It is pretty difficult perhaps for me to



make that point clear. I seem to be having some difficulty about it although it is pretty clear in my mind. For instance, suppose you were driving your automobile through the streets and you suddenly applied the brake. You were driving at such a speed when you suddenly applied the brake that the car came to a violent and sudden stop causing injury to some one. Now if you were negligent in getting into a position where it was necessary for you to apply the brake so suddenly you would be chargeable with the consequences of your negligence, even although your brake, applied, worked properly, did just exactly what you meant it to do and did the work for which it was intended. That is, a man who gets into an emergency by reason of his negligence cannot escape the consequences of that negligence by reason of the fact that, being in that emergency, he does the best thing and may be takes a course of action which results in less damage being done than might have happened if he had not performed that act. That is, to apply it to this case again, merely because the instantaneous device operated and operated in the way in which it was intended to operate and thus prevented more serious injury from happening than did happen, in this particular case, it would not absolve the defendants from blame if they were negligent in causing the safety device to come into operation. What I am trying to say is, even although so far as the safety device on the car is concerned it was in perfect condition, and there was no negligence on the part of the defendants with respect to it alone, yet, if they negligently permitted the car to descend at such a speed as to put that safety device into operation, they would be responsible then for the results of their negligence. To use another illustration which occurs to me, to make the point a little more clear. Suppose that a railroad track is equipped with a safety turnout, a safety switch, as most of them are; two trains are approaching each other and a collision is inevitable unless the switch is turned; the switch is turned through the operation of some safety device; the result is that one of the trains is thrown out on to the switch and ditched, resulting in injury to many passengers. If those trains were permitted by the negligence of the persons in charge of them and responsible for their operation to be upon the same track so that the danger of a collision was imminent, they would be responsible for that negligence, even although the injury that in fact occurred

through the operation of the safety device was not nearly as great as would have occurred if there had been no safety device."

A presiding judge may use illustrations for the purpose of more pointedly directing the attention of the jury to the questions they are to decide. It is a matter of discretion not to be reviewed unless prejudicial error is positively shown, which is not found in the present record. *Commonwealth v. Johnson*, 188 Mass. 382, 387, and cases cited. It is urged that the second illustration was extremely harmful, because it impliedly imposed upon the defendants the duty of a common carrier of passengers. But the preceding instructions which elaborately stated the character and scope of the defendants' responsibility were repeated more briefly but substantially, immediately thereafter, and there is no ground for complaint that the jury misunderstood the instructions, or were misled by the illustrations. *Adams v. Nantucket*, 11 Allen, 203.

A majority of the court are of opinion that, the defendants having failed on a full examination of the record to establish any reversible error requiring a new trial, the order in each case must be

*Exceptions overruled.*

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FLORENCE S. FRIEND vs. CHILDS DINING HALL COMPANY.

Suffolk. November 15, 1917. — September 11, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

*Innkeeper. Restaurant Keeper. Food. Contract, Implied, Negligence of plaintiff. Words, "Victualler."*

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. CROSBY, J., dissenting.

In an action of contract against a restaurant keeper for furnishing food to the plaintiff to be eaten on the premises which was not fit to eat, it was said that, assuming that the provision of the sales act contained in St. 1908, c. 237, § 15 (3), that, "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed," applied to such an action, and assuming, contrary to the circumstances of the case, that it was the plaintiff's duty to examine the food before eating it, it would be a question of fact whether rational investigation was made by the plain-

tiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered.

TORT OR CONTRACT for injuries sustained by the plaintiff in attempting to eat foreign matter furnished to her as food at the defendant's restaurant in Boston on July 12, 1915, the declaration containing a count in tort for personal injuries and a count in contract, which is quoted below. Writ dated December 4, 1915, and amended on January 2, 1917, by adding the words "or contract."

The second count, on which the plaintiff elected to rely, waiving her first count, was as follows: "Count 2. Now comes the plaintiff in the above entitled action and says that the defendant corporation owned, conducted and managed a dining hall or lunch room in Boston, County of Suffolk; and was there doing business with and for the accommodation of the public; that on or about July 12, 1915, on the request and invitation of the defendant in its said lunch room the plaintiff ordered and bought of said defendant and said defendant sold and delivered to the plaintiff certain food for the purpose and with the express understanding that said food was to be then and there eaten by the plaintiff; that in consideration of the price agreed to be paid and actually paid by said plaintiff for said food, the defendant promised and under implied warranty represented that said food furnished was and would prove to be in a good and wholesome condition and fit to eat; that the plaintiff relied on the defendant's skill and judgment in the selection and preparation of said food then and there paid for and ate said food—that said food so selected, delivered and furnished by said defendant for the purpose of being eaten by said plaintiff, was not in a wholesome condition and fit to eat but was unwholesome, contained foreign matter and was otherwise unfit to be eaten whereby the plaintiff in the exercise of due care while eating said food was injured, was made sick, suffered pain of body and anguish of mind, was put to expense for medicines, dental and medical treatment, was unable to perform her usual labor and was otherwise put to loss and damage."

The answer contained a general denial, and also alleged that the plaintiff at the time of the alleged injury was not in the exercise of due care.

In the Superior Court the case was tried before *Bell, J.* The plaintiff's evidence is described in the opinion. At the close of the plaintiff's evidence, the defendant asked the judge to order a verdict for it. Whereupon the judge with the consent of the parties reported the case for determination by this court and, the parties agreeing upon \$150 as the amount of the damages, the judge ordered the jury to return a verdict for the defendant, with leave reserved, with the consent of the jury, to enter a verdict for the plaintiff for \$150 if this court should decide that the ordering of the verdict was wrong and that the plaintiff was entitled to recover; otherwise, the verdict for the defendant was to stand.

St. 1908, c. 237, § 15, begins as follows:

"Section 15. Subject to the provisions of this act and of any other statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

"(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

*J. H. Baldwin & C. H. Donahue*, for the plaintiff, submitted a brief.

*F. H. Smith, Jr.*, for the defendant.

RUGG, C. J. There was evidence tending to show that the defendant kept in Boston a restaurant, in which the plaintiff ordered from one of the waitresses, "New York baked beans and corned beef." This food was served to the plaintiff and she sat at a table to eat it. She testified, "I started to eat the food and there were two or three dark pieces which I thought were hard beans, that is, baked more than the

others, and I put two in my mouth and bit down hard on them, and . . . I was hurt. . . . I took those things out of my mouth and found they were stones." There was no further evidence that the plaintiff had anything to do with the selection of the beans. She gave no instructions respecting the food other than to order it. There was no evidence of express warranty or that the defendant knew of the presence of the stones in the food. There was evidence of injury to the plaintiff. At the close of the evidence the plaintiff elected to rely upon a count for breach of an implied warranty of fitness to eat in a contract for food to be eaten on the premises of the defendant. The defendant introduced no evidence. The question is whether the plaintiff was entitled to go to the jury.

There is strong ground for holding that the contract made between one who keeps a restaurant and one who resorts there for food to be served and eaten on the premises is a sale of food. The evidence in *Commonwealth v. Worcester*, 126 Mass. 256, was that on two or three different occasions people resorted to the defendant's dwelling house and there were served with meals; with these and as a part thereof intoxicating liquors were provided. The price paid was single, including both food and drink. The complaint was for keeping a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors. It was held that "The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of the meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase, and all were charged in one collective price." That decision rests entirely upon common law principles as to sales and St. 1875, c. 99, § 17, then in force (now R. L. c. 100, § 64), making delivery of intoxicating liquor under certain circumstances *prima facie* evidence of sale, was not adverted to and very likely was not applicable to the facts there presented. Precisely the same point was held in *State v. Lotti*, 72 Vt. 115. The defendant in *Commonwealth v. Warren*, 160 Mass. 533, was charged with selling milk not of good standard quality contrary to St. 1886, c. 318, § 2. The evidence was that a guest at the inn of the defendant conducted on the American plan was served

as a part of his breakfast, for which he paid a single price, with a glass of milk not of the quality required by the statute. It was said in the course of the opinion holding that the defendant might be found guilty, "The milk bought by the witness Kelly was purchased by and delivered to him as a part of his breakfast, and was just as much a sale as if a specific price had been put upon it, or it had been bought and paid for by itself." Similar decisions have been made by other courts. In *People v. Clair*, 221 N. Y. 108, it was held that the serving of partridges by a hotelkeeper to guests who paid for board and room at the rate of \$2 per day, was a sale as matter of law in violation of a statute which provided that such game should "not be sold, offered for sale, or possessed for sale for food purposes." A similar decision was rendered in *Commonwealth v. Phoenix Hotel Co.* 157 Ky. 180, with reference to the possession of quail by an innkeeper with intent to serve to his guests in violation of a statute which prohibited the sale of such birds. It there was said at page 185, "The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it and the proprietor of the hotel or restaurant as certainly exposes it for sale and sells it as if it were purchased for compensation from a dealer who had it for sale and was carried home by the purchaser to be served on his table." It was decided in *Commonwealth v. Miller*, 131 Penn. St. 118, that where the keeper of a restaurant served oleomargarine with a meal to a guest who was charged and paid fifty cents for the meal, there was a sale within the terms of a statute which prohibited the sale of oleomargarine.

In view of these decisions it would be difficult for this court to hold that the transaction arising from a contract to serve to a guest food to be eaten by him upon the premises of the keeper of an eating house, is not a sale. If it is a sale, then plainly it is governed by the sales act, St. 1908, c. 237, § 15 (1), which is in these words: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." It is manifest that at least it might be inferred from the relations of the parties, that the

guest who asks to be served food upon the premises of one who is the keeper of a restaurant makes known as the particular purpose for which the food is required that it is then and there to be eaten, and that he relies upon the latter's skill or judgment in the selection and preparation of the food. Hence there would be an implied warranty that it was reasonably fit for such purpose.

If the transaction is a sale, the rule is the same apart from the sales act. That was settled after great consideration in *Farrell v. Manhattan Market Co.* 198 Mass. 271, a case decided before the sales act took effect. It there was held, page 284, that the English rule as to implied condition of soundness in the sale of food by a dealer prevails here. That rule was stated at pages 280, 281, in these words: "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the sale of goods act, if the sale is made by one not a dealer, there is no liability, by force of § 14. If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract, . . . or in response to an order not given in person, . . . or even when the order is given in person in the dealer's shop, provided, . . . that the selection is left to the dealer."

But there is authority to the effect that, when food is furnished to a guest by the keeper of a restaurant or inn, the transaction does not constitute a sale, that the title to the food does not pass, that the customer may consume so much as he pleases, but that he cannot carry away of the portion ordered that which he does not eat, or give or sell it to another; and that the charge made is not for the food alone, but includes the service rendered and the providing of a place in which to eat. It is stated in *Beale on Inn-keepers*, § 169, "The title to food never passes as a result of an ordinary transaction of supplying food to a guest; or, as it was quaintly put in an old case, 'he does not sell but utters his provision.'" *Parker v. Flint*, 12 Mod. 254.

Therefore it seems desirable to consider somewhat the relation of the guest to a keeper of a place where food is served for immediate consumption. It is ancient law that when one resorts to a tavern, inn or eating place, there for a consideration to be served

with food for immediate consumption, and is received as a guest by the keeper, a duty is implied that the food shall be fit to eat. It has been said that "if a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern-keeper . . . an action lies against him without express warranty, for it is a warranty in law." Keilwey's Rep. 91. *Burnby v. Bollett*, 16 M. & W. 644, 646, 647, 654, where are the references to numerous older cases. "A taverner or vintner was bound as such to sell wholesome food and drink." Ames Lectures on Legal History, page 137, citing also cases from the year books. "If a man sell victuals which is corrupt, without warranty, an action lies, because it is against the Commonwealth." *Roswel v. Vaughan*, Cro. Jac. 196, 197. To the same effect in substance are 1 Roll. Abr. 95, 1 Fitz-Herbert's Natura Brevium, 94 C note, supposed to be by Lord Chief Justice Hale, and 1 Bl. Com. 430, 3 Bl. Com. 166. See Williston on Sales, § 241, note 82; *Farrell v. Manhattan Market Co.* 198 Mass. 271, 275. The relation between guest and host in a public house is one of contract. It seemingly is the result of those early authorities that it was an implied term or condition of that contract that the food and drink furnished should not be harmful, but appropriate for eating.

There are numerous other illustrations in the law of contracts of an implied condition that the thing sold is merchantable. See, for example, *Murchie v. Cornell*, 155 Mass. 60, 63; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 451, 453; *Inter-State Grocer Co. v. George William Bentley Co.* 214 Mass. 227, 231. Food for immediate use which is not fit to eat is not merchantable as food. This rule was held in *Farrell v. Manhattan Market Co.* 198 Mass. 271, to be applicable to cases where a purchaser buys from a dealer food at retail for immediate use. That rule now prevails generally in this country. *Flesscher v. Carstens Packing Co.* 93 Wash. 48, 54. *Zielinski v. Potter*, 195 Mich. 90. *Catani v. Swift & Co.* 251 Penn. St. 52, 54. *Nelson v. Armour Packing Co.* 76 Ark. 352. *Askam v. Platt*, 85 Conn. 448. *Race v. Krum*, 222 N. Y. 410, 414. *Osgood v. Lewis*, 2 Har. & Gill, 495, 520. *Dulaney v. Jones*, 100 Miss. 835, 840. *Parks v. C. C. Yost Pie Co.* 93 Kans. 334, 337. See, however, *Crigger v. Coca-Cola Bottling Co.* 132 Tenn. 545, 552, and *Green v. Ashland Water Co.* 101 Wis. 258, 263-265.



The authorities already cited appear to show that by the common law of England it was an implied term of the contract that the guest should be furnished wholesome food by the proprietor of a public eating house to which he resorted for refreshment.

The historical review, the principles discussed and the ground of decision in *Frost v. Aylesbury Dairy Co. Ltd.* [1905] 1 K. B. 608, 613, 614, (although that case arose under the sale of goods act,) afford basis for the conclusion that it has continued to be the law of England to the present. At all events there is nothing to indicate that this common law rule was changed in England before the emigration of our ancestors to the new world. Hence that principle was brought over with them and has become a part of our heritage. This is so whether the origin of that law was general custom or statutory enactment. *Crocker v. Justices of Superior Court*, 208 Mass. 162, 166, 167. There is no adjudication or dictum of this court (so far as we are aware) which indicates that the principle has not heretofore and does not now prevail here. The implication in *Emerson v. Brigham*, 10 Mass. 197, 200, 201, from the use of the word "victuals," which commonly refers to food ready to eat, and "victualler," which usually is the synonym of publican and means one who serves food or drink prepared for consumption on the premises, *Tyson v. Smith*, 9 Ad. & El. 406, 423, is that this principle was then in the mind of the court. The question has not been raised in any of our recent decisions in actions against those who serve food for immediate consumption on their premises. *Bishop v. Weber*, 139 Mass. 411. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177. *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265. *Gearing v. Berkson*, 223 Mass. 257. Some of these rest on negligence, and others on *Farrell v. Manhattan Market Co.* 198 Mass. 271. The exhaustive review of cases in the Farrell opinion, demonstrated that it was the law both of England and of this Commonwealth that in the absence of statute it was an implied term of every sale of provisions by a dealer for immediate use, where the selection was not made by the buyer, that the food was fit for consumption. The principles there discussed and the result there reached appear to be equally applicable to the case at bar. It would be an incongruity in the law amounting at least to an

inconsistency to hold with reference to many keepers of restaurants who conduct the business both of supplying food to guests and of putting up lunches to be carried elsewhere and not eaten on the premises, that, in case of want of wholesomeness, there is liability to the purchaser of a lunch to be carried away founded on an implied condition of the contract, but that liability to the guest who eats a lunch at a table on the premises rests solely on negligence. The guest of a keeper of an eating house or of an innkeeper is quite as helpless to protect himself against deleterious food or drink as is the purchaser of a fowl from a provision dealer. The opportunity for the innkeeper or restaurant keeper, who prepares and serves food to his guest, to discover and provide against deleterious food is at least as ample as is that of the retail dealer in foodstuffs. The evil consequences in the one case are of the same general character as in the other. Both concern the health and physical comfort and safety of human beings.

On principle and on authority it seems to us that the liability of the proprietor of an eating house to his guest for serving bad food rests on an implied term of the contract and does not sound exclusively in tort, although of course he may be held for negligence if that is proved. Without repeating the reasoning of *Farrell v. Manhattan Market Co.* 198 Mass. 271, we are of opinion that, on sound legal principles, it bears with equal force upon the facts here presented. Even if there were no common law authority, (which there is, as already pointed out,) it would not be practicable to establish a distinction upon this point which could be supported in reason, between the liability of a retail dealer in meat for immediate consumption and of a victualler who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to sustain liability of the latter with at least equal cogency. They appear to us to rest upon the same footing in principle.

The tendency of recent decisions has been to extend liability of the manufacturer of foods to persons injured by their harmful nature although they purchase from a dealer and have no contractual relation with the manufacturer. *Haley v. Swift & Co.* 152 Wis. 570. *Tomlinson v. Armour & Co.* 46 Vroom, 748. *Watson v. Augusta Brewing Co.* 124 Ga. 121. *Berger v. Standard Oil Co.*

126 Ky. 155. *Parks v. C. C. Yost Pie Co.* 93 Kans. 334, 337. *Catani v. Swift & Co.* 251 Penn. St. 52, 56. *Mazetti v. Armour & Co.* 75 Wash. 622. *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864. See *Ketterer v. Armour & Co.* 160 C. C. A. 111; 247 Fed. Rep. 921. That tendency points in the direction of stricter liability of those who provide food.

The conclusion here reached is in harmony with *Bark v. Dixson*, 115 Minn. 172, *Race v. Krum*, 222 N. Y. 410, and *Doyle v. Fuerst & Kraemer, Ltd.* 129 La. 838. It ought to be said, however, that none of those decisions discuss the principles here relied on as the basis of our judgment. The results reached and the grounds of decision stated in those cases would seem to require the conclusion here reached. It is the precise point decided in *Leahy v. Essex Co.* 164 App. Div. (N. Y.) 903; S. C. 148 N. Y. Supp. 1063.

Apparently the larger number of decisions by courts of this country hold that the liability of the innholder and restaurant keeper for furnishing deleterious food rests upon negligence. The earliest adjudication to that point is *Sheffer v. Willoughby*, 163 Ill. 518. The opinion in that case is brief and contains no reference to the fundamental conceptions of liability by dealers in food, and does not advert to the responsibility of innkeepers, victuallers and vintners at common law. That case was referred to but not adopted in *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, 179. It has been followed in *Travis v. Louisville & Nashville Railroad*, 183 Ala. 415, 424, *Greenwood Cafe v. Lovinggood*, 197 Ala. 34, *Merrill v. Hodson*, 88 Conn. 314, 321, and *Valeri v. Pullman Co.* 218 Fed. Rep. 519. No allusion is made in any of these decisions to the common law authorities and principles to which reference has been made and upon which this judgment in part rests. We feel constrained not to adopt their conclusions, so far as they are inconsistent with the reasoning of this opinion. The decision in *Bigelow v. Maine Central Railroad*, 110 Maine, 105, goes upon a different ground, and that here discussed is expressly left open at page 111.

It has been urged that public policy demands that the standard imposed upon a restaurant keeper ought to be that of reasonable care, and nothing more. Earnest argument is made to the effect that otherwise the opportunity for groundless litigation will be

fostered. These considerations, when given their full weight, do not appear to us to overbalance the reasons which have been stated.

The baked beans served to the plaintiff with the stones of the size of and resembling beans might have been found to be not reasonably fit to be eaten. A foreign substance of that sort, with its possibilities for harm to teeth, may have been determined by the jury not proper to be served in food.

It has been argued that it should have been ruled as matter of law that the plaintiff was not in the exercise of due care, and on that ground could not prevail. Due care is not a term of the law of contract, but of torts. This is an action of contract. The obligation resting upon the defendant and accruing to the plaintiff arose out of the contract.

The defendant has urged that, if liability be treated as arising either out of a sale or a breach of contract, the plaintiff fails to show requisite examination on her own part, and that reasonable inspection would have revealed the existing defect in the food, and that under such circumstances as matter of law there can be no recovery. Whatever may be the merit of these contentions under appropriate conditions, they are not pertinent to the facts disclosed on this record. If these contentions in favor of the plaintiff are assumed to be sound, and if further it be assumed that § 15 (3) of the sales act is applicable, to the effect that there is "no implied warranty as regards defects which such examination ought to have revealed," nevertheless it was a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered.

Our conclusion is that, whether the transaction established on the evidence between the plaintiff and the defendant be treated as a sale of food, or as a contract for entertainment where the defendant simply "utters his provision" (to use the neat phrase of *Parker v. Flint*, 12 Mod. 254, employed more than two centuries ago) for the benefit of the plaintiff, there was a case to be submitted to the jury.

In accordance with the terms of the report and with leave reserved with the consent of the jury, pursuant to St. 1915,

c. 185, amending R. L. c. 173, § 120, a verdict is to be entered for the plaintiff for \$150.

*So ordered.*

CROSBY, J. I cannot agree with the decision of the majority in this case; and because I believe it to be wrong in principle and contrary to the great weight of authority, I feel constrained to express my dissent.

The decision in effect is, that an innkeeper or the keeper of a restaurant who serves food to a guest is liable as an insurer of the safety of the person of his guest against injury, although he may be wholly free from any negligence in providing and serving such food.

The plaintiff testified that she entered the defendant's restaurant and there ordered of a waitress "New York baked beans and corned beef," which were served to her. She further testified, "I started to eat the food and there were two or three dark pieces which I thought were hard beans, that is, baked more than the others, and I put two in my mouth and bit down hard on them, and . . . I was hurt. . . . I took those things out of my mouth and found they were stones."

There was no evidence of an express warranty or that the defendant knew of the presence of the stones in the food, and unless the plaintiff can recover upon an implied warranty that the food served to her was wholesome and fit for consumption, the defendant is not liable.

The question then presented is whether the keeper of a restaurant is an insurer of the quality of the food which he serves or whether he is liable only for failure to exercise reasonable care in providing and serving food so furnished. Before the decision in this case, the question does not appear to have been decided in this Commonwealth. The sales act, St. 1908, c. 237, § 15, (which is declaratory of the common law so far as pertinent to this case,) cannot, in my opinion, be held to apply to a case where food is furnished by a keeper of a restaurant to a customer or by an innkeeper to his guest, because food so served does not constitute a sale thereof; while the customer may consume so much as he desires, he has no right to carry away any portion thereof which he orders but does not eat, nor does the title to such food pass to

him so that he can sell or give it to another. The charge made for the food is not limited to the food consumed, but includes the furnishing of a place where it may be eaten and the service rendered in connection therewith. Beale on Innkeepers, § 169. *Parker v. Flint*, 12 Mod. 254. *Merrill v. Hodson*, 88 Conn. 314. *Valeri v. Pullman Co.* 218 Fed. Rep. 519.

Nor is the defendant a "dealer" within the meaning of the sales act or independently of it. A dealer is defined as a trader, especially a person who makes a business of buying and selling goods. In *Saunderson v. Rowles*, 4 Burr. 2064, 2068, it was said of a victualler, "He makes no particular contract, like a trader. He cannot be said to get his living by buying and selling, as a trader does. He buys, only to spend in his house: and when he utters it again, it is attended with many circumstances additional to the mere selling price."

In the case of *Farrell v. Manhattan Market Co.* 198 Mass. 271, this court, after tracing the history of the law in England upon this question and referring to many cases, said at page 280: "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the sale of goods act, if the sale is made by one not a dealer, there is no liability, by force of § 14." St. 56 & 57 Vict. c. 71, § 14. Section 15 of the Massachusetts act is similar to § 14 of the English act above referred to. And in *Giroux v. Stedman*, 145 Mass. 439, it was held that the defendants who were farmers and killed and sold two hogs, the produce of their farms, "were not common dealers in provisions, or marketmen," and that there was not an implied warranty that the hogs were fit for food, even if sold with knowledge that they were to be used for that purpose. *Howard v. Emerson*, 110 Mass. 320.

It was said in *Gearing v. Berkson*, 223 Mass. 257, on the authority of *Farrell v. Manhattan Market Co.*, *supra*, that "Even before the enactment of this statute, it was recognized as the law in this Commonwealth, that where the buyer at a shop relies on the skill and judgment of the dealer in selecting food, and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, he is liable if it is not fit to be eaten; while, in case the buyer himself selects provisions, the dealer's implied warranty does not go beyond the implied assertion that he believes

the food to be sound." It cannot be questioned that this doctrine is sound as applied to a dealer; but I believe it has no application to the serving of food by an innkeeper or the keeper of a restaurant, because the food so furnished is not a sale and because the person who so furnishes the food is not a dealer. The question is, whether one who furnishes food to be consumed on the premises is an insurer that it is sound and wholesome and free from deleterious substances. That a right of action, based upon negligence, to recover for the harmful consequences resulting from a sale of unwholesome food will lie, is well established. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, and cases cited.

While innkeepers, common carriers and others are held absolutely liable under certain circumstances, so far as I am aware an innkeeper never has been held to be an insurer of the quality of the food served to his guests, nor is a common carrier of passengers liable as an insurer of their safety; so to extend the rule as to innkeepers and keepers of restaurants, I believe to be contrary to the common law and against the weight of authority in England and in this country. *Parker v. Flint*, *supra*. *Crisp v. Platt*, Cro. Car. 549. *Bigelow v. Maine Central Railroad*, 110 Maine, 105. *Merrill v. Hodson*, *supra*. *Sheffer v. Willoughby*, 163 Ill. 518. *Travis v. Louisville & Nashville Railroad*, 183 Ala. 415. *Clancy v. Barker*, 66 C. C. A. 469; 131 Fed. Rep. 161. *Valeri v. Pullman Co.*, *supra*. 22 Cyc. 1081. 16 Am. & Eng. Enc. of Law, (2d ed.) 547. Beale on Innkeepers, § 169. Burdick on Sales, (2d ed.) 113.

In Beale on Innkeepers, § 169, the rule is stated that "He [an innkeeper] is not an insurer of the quality of his food, but he would be liable for knowingly or negligently furnishing bad and deleterious food. As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of the food supplied to him; nor can he claim a certain portion of food as his own, to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest." *Merrill v. Hodson*, *supra*.

It seems to me that neither under the sales act nor at common

law can the serving of food by an innkeeper or the keeper of a restaurant be deemed to be a sale of goods. The act, § 1, defines a sale of goods to be "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." For the reasons stated, such a transaction cannot be held to be a "sale." Nor does the food so supplied seem to me to be "goods" as that word is defined in § 76 of the act, namely: "'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The transaction involved in serving a guest with food for his consumption in a restaurant is not, in my opinion, an agreement for the transfer of the general property of the food so furnished and appropriated by the guest for the satisfaction of his appetite, involving as it does the personal service rendered in supplying the food and furnishing a place with the things necessary to consume it. If the furnishing of food by an innkeeper or restaurateur is considered as a sale, as previously pointed out, even in the case of sales of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten, and this was true before as well as since the sales act, § 15. *Farrell v. Manhattan Market Co.*, *supra*. *Giroux v. Stedman*, *supra*. *Jones v. Just*, L. R. 3 Q. B. 197. *Emmerton v. Mathews*, 7 H. & N. 586. The law relating to the sale of provisions is the same as in case of the sale of other chattels. *Bigge v. Parkinson*, 7 H. & N. 955.

The case of *Sheffer v. Willoughby*, 163 Ill. 518, decides the precise question involved in the present case. The plaintiff was made ill by eating oysters served in the defendant's restaurant. The court held that the defendant was not an insurer of the soundness of its food and could not be charged with liability upon an implied warranty, but could be held liable only for negligence, citing the earlier case of *Wiedeman v. Keller*, 58 Ill. App. 382.

In *Travis v. Louisville & Nashville Railroad*, *supra*, the plaintiff was made ill by eating unwholesome food furnished by the defendant in one of its dining cars. It was held that there is no warranty of the fitness of food served by a restaurant keeper provided it belongs to that class of food which is generally fit for human consumption and that the defendant was only liable for failure to



exercise reasonable care in the selection and preparation of the food.

The same court, in *Greenwood Cafe v. Lovinggood*, 197 Ala. 34, held that the keeper of a hotel, dining car, cafe or other public eating place, engaged in serving food to customers, is bound to use due care in furnishing such food, citing *Travis v. Louisville & Nashville Railroad*, *supra*.

The precise question involved in the present case was considered in the recent case of *Merrill v. Hodson*, 88 Conn. 314. The plaintiff was made sick by eating canned sweetbreads, alleged to have been unwholesome, which were served to her by the defendants in their restaurant. It was held that the furnishing of food and drink by a restaurant keeper to a customer for immediate consumption upon the premises is not a sale of the food either under the sales act of that State, Pub. Sts. of 1907, c. 212 (which is substantially the same as our act), or at common law, and that therefore, under § 15 of the act, there was not an implied warranty of quality or soundness of the food furnished. The court intimated that an action for negligence is the only remedy for the consequences of eating unwholesome food supplied by the keeper of a restaurant or inn in the usual course of his business.

In *Bigelow v. Maine Central Railroad*, *supra*, the plaintiff alleged that she suffered injury to her health by eating unwholesome canned asparagus, served to her by the defendant in its dining car. She claimed that the defendant was an insurer of the quality of the food which it served. The court held that the defendant was not liable in the absence of an express warranty.

The case of *Valeri v. Pullman Co.*, *supra*, was an action brought to recover for personal injuries sustained by reason of eating unwholesome food in a dining car of the defendant. The court in that case said, at page 524: "In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food." "It seems to me idle, in determining this question, to seek analogies derived from implied warranties in sales of goods. In the first place, one is met at the outset by the legal theory which

has long prevailed that food furnished by a victualler is not a sale."

In discussing this question, it was said by the court in *Clancy v. Barker*, 131 Fed. Rep. 161, at page 163, that "The general rule of law governing the liability of innkeepers when these defendants made their agreement with the plaintiff, the rule which had received the approval of every court which had ever decided the question, so far as we have been able to discover, was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor."

The contention that an innkeeper or victualler at common law impliedly warrants the wholesomeness of food furnished cannot, in my opinion, be sustained. An examination of the older English cases upon this subject will show, I think, that where a liability has been held to exist, it rests upon the ground either that the person furnishing the food or drink knew that it was unwholesome, or because it was furnished in violation of an ancient statute which imposed a penalty for furnishing such food or drink and therefore was "against the Commonwealth."

In the leading case of *Burnby v. Bollett*, 16 M. & W. 644, where all the older authorities are collected, it was held that, where a farmer bought in the public market the carcass of a pig for consumption as food and afterwards sold it to another without warranty, although it was unfit for human consumption, no warranty of soundness was implied by law between the last seller and the purchaser.

Mr. Benjamin, in his book on Sales, (4th ed.) at page 671, after referring to this case, states that "The notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which make the sale of unsound food punishable. . . . It is submitted that it results clearly from these authorities that the responsibility of a victualler, . . . for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any *damage caused* by their sale of unwholesome food." The statute referred to in *Burnby v. Bollett*, *supra*, was swept away by St. 7 & 8 Vict. c. 24.

In *Roswel v. Vaughan*, Cro. Jac. 196, cited in the opinion in the present case, it was said that "if a man sells victuals which is corrupt, without warranty, an action lies, because it is against the Commonwealth;" the ground of the decision obviously being that the liability rests upon the violation of the statute in making such a sale punishable as a criminal offence. The action was on the case in the nature of deceit in which it was alleged that the defendant falsely represented that he was the incumbent of a vicarage and had a right to the tithes, and which he undertook to sell to the plaintiff but without express warranty. It was held that the action would not lie.

It is stated by Blackstone (vol. 1, page 430), "So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring action against the master," and cites 1 Roll. Abr. 95, which refers to a statement in the Year Book, 9 Hen. VI, page 53: "If a taverner sells wine, knowing it to be corrupt, to another as sound, good and not corrupt without any express warranty, still an action of deceit lies against him for there is a warranty in law." There would seem to be no doubt as to the correctness of the rule stated as it expressly appears in the case cited that the innkeeper knew the wine was unwholesome.

In referring to these old English cases, it is stated in Williston on Sales, §§ 241, 242, "There is considerable talk in the early law in regard to a special obligation of warranty in the sale of provisions more extensive than that arising in the sale of other articles. The old authorities seem to have been rested, in part at least, upon the language of an old statute. But whatever the basis of the doctrine it was laid down broadly by Blackstone, that 'in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit), may be had.' This statement is frequently repeated and relied on as a ground for decision. . . . It is doubtful, however, if it would now generally be held that there was such a warranty unless the seller was a dealer." Burdick on Sales, (2d ed.) 113.

Whatever may have been the reason for the decisions in the English cases above referred to, and many others cited in the opinion in the present case, it seems to me that there is no analogy to be drawn from them in favor of the contention that there is an implied warranty of fitness in the furnishing of food by an inn-

keeper or victualler, because such a transaction is in no sense a sale, as established by decisions rendered by the English courts more than two centuries ago, the soundness of which has never been questioned in subsequent English cases. *Crisp v. Platt, supra. Saunderson v. Rowles, supra. Parker v. Flint, supra.*

Without referring in detail to the decisions cited in the opinion of the majority of the court, it seems to me they all are distinguishable from the case at bar, either because the ground of liability in the cases cited is based upon negligence or because the actions were brought against persons who were dealers.

The case of *Commonwealth v. Worcester*, 126 Mass. 256, which held that the defendant might be convicted of keeping and maintaining a tenement used for the illegal sale and keeping of intoxicating liquor, under Gen. Sts. c. 87, § 6, if he furnished such liquor with meals supplied to customers, does not seem to me conclusive upon the question whether an innkeeper or keeper of a restaurant who makes a sale of food or drink to guests, is liable in an action of contract upon an implied warranty. Apparently the only question in that case was, whether the furnishing of the liquor for a price which included the price of the meal could in any event be regarded as a sale within the meaning of the statute. The question whether the furnishing of food or drink by an innkeeper or victualler to a guest, in good faith, did or did not constitute a sale with an implied warranty that it was wholesome and fit for food for human consumption, was not raised nor considered in the brief opinion.

The case of *Commonwealth v. Warren*, 160 Mass. 533, was a complaint against the defendant for a sale of milk not of the standard quality, under St. 1886, c. 318, § 2. The milk was sold in connection with food furnished as a part of a meal and the price paid included both. The question whether the transaction amounted to a sale would seem to have been wholly immaterial to the decision, as the statute (§ 2) in part provided that the sale, exchange, delivery, or having custody or possession with intent to sell or exchange, of milk not of standard quality is a criminal offence. Accordingly a delivery of such milk would be a violation of the statute even if there were no sale. The question whether the transaction was a sale by an innkeeper or victualler which

made him liable upon an implied warranty was not considered nor decided, so far as appears by the record.

I do not think that the case of *Commonwealth v. Worcester, supra*, and the case of *Commonwealth v. Warren, supra*, involving, as they do, violations of criminal statutes, should be regarded as decisive in cases involving civil liability arising from contract which it is plain the court never intended to pass upon. Manifestly the court never intended by the judgment in those cases to decide that the furnishing of food to a guest created a contract of sale which carried with it an implied warranty that the food furnished was sound. There seems to me to be no controlling reason for holding that we are bound by these cases or that they are not clearly distinguishable from the case at bar.

The only cases in this country or in England which, so far as I am aware, decide the precise point in the present case and hold that there is an implied warranty in the furnishing of food, are *Leahy v. Essex Co.* 164 App. Div. (N. Y.) 903, and *Rinaldi v. Mohican Co.* 171 App. Div. (N. Y.) 814. The former was decided by the Appellate Division of the Supreme Court of New York on the authority of *Race v. Krum*, 162 App. Div. (N. Y.) 911. The latter has recently been decided by the New York Court of Appeals, 222 N. Y. 410. That decision holds that as the defendant, a druggist, manufactured the ice cream which he sold to the plaintiff and which made him ill, the defendant could be found liable. It is to be observed that the court carefully refrained from deciding the question which has arisen in the case at bar, when it was said, at page 413: "In this connection, however, it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer who makes or prepares the article that he is selling." This statement of the liability of a manufacturer is in accord with the rule stated in *Jones v. Just, supra*, *Leavitt v. Fiberloid Co.* 196 Mass. 440, *Haley v. Swift & Co.* 152 Wis. 570. It is apparent that the two cases above referred to, decided by the Appellate Division of the Supreme Court of New York, are not of controlling importance.

While the case of *Farrell v. Manhattan Market Co., supra*, is cited and relied on by the plaintiff in support of her contention, it

seems to me to mark clearly the distinction between a sale of provisions by a dealer, and the furnishing of cooked food by an innkeeper or restaurateur for immediate consumption upon the premises. It is evident that this court did not in that case decide that such persons were "dealers," when it is stated on page 286: "Whatever may be the rule in respect to caterers in serving meals, there is no case in which it has been held that in the sale of provisions by a dealer the test of his liability is negligence." *Merrill v. Hodson*, 88 Conn. 314, 321.

In referring to the case of *Bishop v. Weber*, 139 Mass. 411, it is stated in the opinion in the *Farrell* case at page 286: "All that was decided in that case was that the declaration was good. Whether negligence is the ground for holding a caterer or innkeeper liable for serving poisonous food was not discussed."

In the *Farrell* case (page 280) it is also stated that "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the sale of goods act, if the sale is made by one not a dealer, there is no liability, by force of § 14." And in referring to the law of this Commonwealth, it is stated (page 283) that "There is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten. *Howard v. Emerson*, 110 Mass. 320, and *Giroux v. Stedman*, 145 Mass. 439."

The general rule of law, which has always prevailed, so far as I have been able to discover, is that innkeepers and restaurateurs are not insurers of the safety of their guests whom they serve with food, but that their obligation is limited to the exercise of reasonable care in the furnishing and serving such food.

It does not seem to me that public policy or justice demands that a restaurant keeper or innkeeper should be held to warrant impliedly the wholesomeness of food served by him, making him in effect an insurer of its fitness for consumption, no matter how carefully it may be prepared and served. I am of opinion that the absolute liability which the opinion of the majority of the court imposes is not necessary for the protection of the public, but is apt to result in the prosecution of groundless claims which it will be difficult, if not impossible, to meet.

The fact that this is the first case that has ever arisen in this

Commonwealth where it has been attempted to charge the keeper of a restaurant or a hotel upon an implied warranty respecting the quality of food furnished, would seem to make it plain that the rights of individuals and the public are amply protected by holding those engaged in those occupations liable only for negligence.

If it be deemed necessary, for the protection of patrons of restaurants, hotels, and other places where food is served for immediate consumption upon the premises, to hold persons engaged in such occupations as insurers, it would seem to me to be a subject for legislative rather than judicial determination.

I believe the decision of the majority is wrong in principle, and that it imposes an unjust and unnecessary burden upon a large number of persons engaged in a useful and necessary business. I am also constrained to dissent from the decision because I believe it is contrary to the rule as laid down by the English courts from the earliest times, and is at variance with the decisions of the courts of the United States and of the courts of last resort in several States.

So far as I am aware, the result reached in the opinion is not supported by the decision of any court of last resort where the precise question in the case at bar has been considered.

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### FLORA ASH vs. CHILDS DINING HALL COMPANY.

Suffolk. January 8, 1918. — September 11, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Innkeeper. Restaurant Keeper. Food. Negligence, In furnishing food, Res ipsa loquitur.*

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened by such tacks.

In the case in which the points above stated were decided, it was *said* that no question was raised as to the contractual relation between the parties.

TORT for personal injuries alleged to have been sustained by the plaintiff on July 8, 1915, by reason of the defendant's negligence in serving to the plaintiff as food a piece of blueberry pie in which a nail or tack was concealed. Writ dated February 16, 1916.

The plaintiff's declaration was as follows: "And the plaintiff says the defendant is a corporation duly established by law and conducts dining halls in Boston, selling food to customers; that on or about July 8, 1915, while she was a customer of the defendant company, eating in a dining hall of said defendant, to wit at 269 Washington Street, and while lawfully upon the premises, and while in the exercise of due care, she was injured by reason of a nail which was in a piece of pie she was eating becoming stuck in her throat; that she could not see the nail and had no knowledge of its being in said pie; that it was the duty of the defendant company to provide food that is safe for customers to eat, but that, unmindful of its duty the defendant, by its servants and agents, carelessly and negligently permitted said nail to get into said pie. And the plaintiff says that by reason of said injury, she has been put to great expense for nursing, medicines and medical attendance, and has suffered greatly both in mind and body, to her great damage."

The answer contained a general denial and also alleged that the plaintiff was not in the exercise of due care at the time of the alleged injury.

In the Superior Court the case was tried before *Chase, J.* The evidence is described in the opinion.

At the close of the evidence the judge asked the counsel for the plaintiff, "Are you prepared to go to the jury on the pleadings as they stand?" and the counsel answered, "Yes." The defendant then asked the judge to order a verdict for the defendant upon the ground that on all the evidence the plaintiff was not entitled to recover. The judge refused to do this, and the defendant then asked the judge to instruct the jury as follows:

"1. That on all the evidence there should be a verdict for the defendant.

"2. That the plaintiff has not sustained the burden of proof that the defendant was negligent."



"5. That the evidence does not warrant a finding that the defendant was negligent."

"7. That the fact, if it be a fact, that the food furnished the plaintiff contained a deleterious foreign substance is not of itself evidence of negligence sufficient to warrant a finding for the plaintiff."

"8. That the fact, if it be a fact, that the food furnished the plaintiff contained a deleterious foreign substance is not of itself evidence sufficient to charge the defendant with knowledge of the presence of the substance so as to make the defendant liable."

The judge refused to give any of these instructions and submitted the case to the jury. The close of the judge's charge was as follows: "The defendant is not liable merely because the tack was there, if it was there. It is not liable unless the tack was there and had not been discovered and taken out through its negligence. The question is whether you think you ought as reasonable men to infer negligence from the presence of the tack in the pie if there is no other explanation of it. The question is for you."

The jury returned a verdict for the plaintiff in the sum of \$150; and the defendant alleged exceptions.

*F. H. Smith, Jr.*, (*W. F. White* with him,) for the defendant.

*A. J. Connell*, for the plaintiff.

*RUGG, C. J.* This is an action of tort. It rests solely upon allegations of negligence. The burden of proving that the proximate cause of the plaintiff's injury was the negligence of the defendant or its servants or agents rested on the plaintiff. It is well settled that the duty rests upon the keeper of an inn, restaurant or other eating place to use due care to furnish wholesome food, fit to eat. Failure in this respect resulting in injury is foundation for an action for negligence. *Bishop v. Weber*, 139 Mass. 411, 417. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177. *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265. *Tomlinson v. Armour & Co.* 46 Vroom, 748, 762.

The testimony of the plaintiff tended to show that she received injuries from the presence of a tack in a piece of blueberry pie which she was eating while a guest of the defendant in its restaurant. Her description was that "there lodged in her throat, in her right tonsil, a very thin small-headed tack, the head a little mite larger than a pin head . . . it was a little longer than a

carpet tack." It was not the same shape as a carpet tack. "It was thin, long and a very small head." The head was flat. "It was a black tack."

The pie was made by the defendant on its premises and served as food by its waitress to the plaintiff. The manager of the defendant testified that at that time its blueberries came in ordinary quart berry baskets, made of wood in which were tacks "hardly an eighth of an inch long, with a flat head, and that this was the first time in the eighteen years that he had been in the business that he had seen a tack in blueberries." There was other testimony to the effect that a high degree of care was exercised in the preparation of the blueberries for the pies. That is laid on one side, as it may not have been credited by the jury. But disbelief of the defendant's testimony as to the precautions used by it cannot take the place of evidence of negligence.

There is nothing in the record from which it can be inferred that the harm to the plaintiff resulted directly from any failure of duty on the part of the defendant. The precise cause of her injury is left to conjecture. It may as reasonably be attributed to a condition for which no liability attaches to the defendant as to one for which it is responsible. Under such circumstances the plaintiff does not sustain the burden of fastening tortious conduct on the defendant by a fair preponderance of all the evidence, and a verdict ought to be directed accordingly. *Leavitt v. Fiberloid Co.* 196 Mass. 440, 444.

The tack was very small. It was so tiny that it readily might have become embedded in a blueberry. If so, its color and shape were such that it would naturally escape the most careful scrutiny. It might as readily have stuck into a blueberry before it came to the possession of the defendant as afterwards. The carelessness of some person for whom the defendant in no way was responsible might have caused its presence in the pie. The maker of the basket, some previous owner of the berry, or some other third person, is as likely to have been the direct cause of the tack being in the pie as the defendant or those for whose conduct it is liable. The facts are quite different from those disclosed in *Hunt v. Rhodes Brothers Co.* 207 Mass. 30.

These suggestions make it plain that this is not a case for the application of *res ipsa loquitur*. That doctrine may be invoked

in the case of an unexplained accident which, according to the common experience of mankind, would not have happened without fault on the part of the defendant. *St. Louis v. Bay State Street Railway*, 216 Mass. 255, 257. It does not avail where the cause of the injury is just as likely to have been the fault of another. The mere fact of injury does not show negligence. The burden of proof resting upon the plaintiff to establish that fact must be sustained by evidence either direct or inferential. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 176. The case falls within the class of which *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, *Kusick v. Thorndike & Hix, Inc.* 224 Mass. 413, and *Burnham v. Lincoln*, 225 Mass. 408, are examples. See in this connection *Hasbrouck v. Armour & Co.* 139 Wis. 357.

No question arises as to the contractual relations between the parties.

In the opinion of a majority of the court, the entry must be

*Exceptions sustained.*

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BLISS B. WARD vs. GREAT ATLANTIC AND PACIFIC TEA  
COMPANY.

Essex. March 12, 1918. — September 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Sale*, Implied warranty. *Food*. *Evidence*, Matters of common knowledge.

Under the provision of the sales act contained in St. 1908, c. 237, § 15 (1), which in this respect is declaratory of the common law, a dealer who sells for food to a customer a sealed can of baked beans containing among the beans a pebble that looks like a bean, which breaks a tooth of the purchaser, can be found to be liable to the purchaser in an action of contract for his injuries thus sustained, there being in such a sale by a dealer, under the statute as at common law, an implied warranty that beans so purchased for food "shall be reasonably fit for such purpose." CROSBY, J., dissenting.

It was said that it is a matter of common knowledge that pebbles often are found in raw and uncleaned beans.

TORT (as stated in the writ) for the breaking of a tooth of the plaintiff on March 22, 1917, by a pebble contained in a can of

baked beans purchased by the plaintiff on March 16, 1917, at the store of the defendant in Ipswich. Writ dated April 27, 1917.

In the Superior Court the case was submitted to *Jenney, J.*, upon a case stated, containing the facts which are described in the opinion. At the request of the parties the judge reported the case for determination by this court as follows: "Report under Gen. Acts, 1917, c. 345. This case came on to be heard before me upon a case stated by the parties embodied in a written agreement signed by both parties and filed herein. At the request of both parties, I report the case to the Supreme Judicial Court for determination, without making any decision thereon."

The case was submitted on briefs.

*E. J. Carney, C. A. Green & J. F. Doyle*, for the plaintiff.

*G. R. Nutter & J. E. Peakes*, for the defendant.

RUGG, C. J. The defendant conducts a retail grocery store at Ipswich. It had for sale at this store beans in sealed all tin cans, bearing this label: "Grandmother's Brand A & P Beans & Pork with Sauce, contents 2 lbs. 1 oz." "Remove contents of this can as soon as opened and place in earthenware dish." "The Great Atlantic & Pacific Tea Co. Incorporated, Distributors, Jersey City, N. J., U. S. A." These cans of beans were purchased by the defendant from the Thomas Canning Company of Grand Rapids, Michigan, after canning. It furnished the labels which were affixed to the cans by the manufacturer. The defendant had no supervision of the process of canning and no knowledge or means of knowledge that any foreign substance was in the cans. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company is an independent reputable manufacturer of canned goods and in its processes employed all modern methods to prevent the presence of foreign substances in its products. Its goods were widely distributed and were considered to be of good quality by the wholesale and retail stores which handled them. On or about March 16, 1917, the defendant through the manager of its Ipswich store sold to the plaintiff one of these sealed cans of beans. At no time after the sealing of the can until it was opened by the plaintiff was there visible indication that the contents were in any way defective or that the can contained any foreign substance. The can contained baked beans, among which was a small pebble. The plaintiff was ignorant of

its presence and, while eating the beans, broke his tooth on the pebble and later on account of this injury, was obliged to have the tooth extracted.

The case comes before us by report on a case stated. No point is open as to the form of action or pleadings. The only question is whether the plaintiff can recover in any form of action. *Smith v. Carney*, 127 Mass. 179. *Brettun v. Fox*, 100 Mass. 234.

The transaction between the plaintiff and the defendant as to the can of beans necessarily involved a purchase of food to be eaten. That need not be stated in precise words. It was an underlying and essential condition of the contract, implied without expression. It arose from the nature of the goods, the size of the purchase and the terms of the label. It is provided by the sales act, St. 1908, c. 237, § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." That provision governs the relations of the parties in the case at bar. In this respect the statute is in substance, so far as concerns a dealer such as the defendant, simply a codification of the common law. It was said in *Farrell v. Manhattan Market Co.* 198 Mass. 271, 279, 280, 281, a case arising before the sales act, "Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and, if they are so ordered, he is liable if they are not fit to be eaten. . . . If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract . . . or in response to an order not given in person . . . or even when the order is given in person in the dealer's shop, provided . . . that the selection is left to the dealer. . . . But, even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer

that the provisions are unsound) if the provisions are not fit for food." The opinion in that case contains an exhaustive review of the authorities. See, also, in this connection, *Race v. Krum*, 222 N. Y. 410, 414, and *Cook v. Darling*, 160 Mich. 475, 481; *Parks v. C. C. Yost Pie Co.* 93 Kans. 334, 337, and L. R. A. 1917 F, note 472 to 475.

That statement of the law, which is but an amplification so far as relates to the case at bar, of the terms of the sales act, governs the facts here presented. The defendant was a dealer, the plaintiff a buyer at retail. There arises inevitably the implication that the plaintiff made known to the defendant that he was purchasing the beans for consumption as food and that he was relying, because from the character of the transaction he was bound to rely, upon the skill of the defendant in selecting the can which was offered to him.

It is not expressly stated in the agreed facts that the defendant selected the can for delivery to the plaintiff, or that the latter relied upon the skill and judgment of the defendant in selecting the can for delivery. But that he did so rely seems an almost irresistible inference from the facts stated. The cans in the defendant's stock were all alike in label and in general appearance. The cans were sealed. Their contents could not in the nature of things be open to inspection before the sale. There could be no intelligent selection based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or trade name. The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance, as in the *Farrell* case. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express state-

ment to the contrary, this must be regarded as a necessary inference from the relation of the parties.

There appears to us to be no sound reason for engrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. But the principle stated in *Farrell v. Manhattan Market Co.* 198 Mass. 271, is a general one. It has long been established. Simply because it may work apparent hardship in certain instances is no reason for changing it to fit particular cases. It is a salutary principle. It has become wrought into the fabric of the law as the result of long experience. It may be assumed that the affairs of mankind have become adjusted to it. It has recently been adopted by the Legislature in codifying the law as to sales. It imposes liability in the absence of an express contract between the parties governing the subject. It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer. In the case at bar the plaintiff had no means of ascertaining the manufacturer from inspection of the goods bought. The retail purchaser in cases of this sort ordinarily would be at some disadvantage if his only remedy were against the manufacturer.

It was said by Farwell, L. J., in the course of a judgment in the Court of Appeal in *Jackson v. Watson & Sons*, [1909] 2 K. B. 193, at page 202, "The plaintiff sues for breach of contract of warranty of fitness for human food of certain tinned salmon supplied to and eaten by himself and his wife, and there is not (and indeed since *Frost v. Aylesbury Dairy Co.* [1905, 1 K. B. 608] there could not well be) any question as to the sufficiency of his cause of action: the only question is as to the damages." The *Frost* case related to a sale of milk by a retail dealer. Both cases arose under the English sale of goods act, § 14 (1), quoted at length in *Farrell v. Manhattan Market Co.* 198 Mass. 271, at pages 278, 279, which does not differ in any particular material to the present case from § 15 (1) of our sales act. It is manifest, therefore, that

the English courts hold that under the sale of goods act there is no distinction between canned goods and goods not canned and open to inspection, so far as concerns the implied warranty of fitness in sales of food to the ultimate consumer. Decisions of this character, in view of the fact that the English sale of goods act was enacted before our own, and of the close similarity of the pertinent section of each act, are entitled to consideration. See *McNicol's Case*, 215 Mass. 497, 499. Decisions of an inferior court in Illinois are precisely to the same effect, namely, that in sales by a retail dealer to a consumer canned goods are on the same footing as other foods, *Sloan v. F. W. Woolworth Co.* 193 Ill. App. 620, *Chapman v. Roggenkamp*, 182 Ill. App. 117, being based upon *Wiedeman v. Keller*, 171 Ill. 93.

There is nothing in *Winsor v. Lombard*, 18 Pick. 57, inconsistent with the conclusion here reached. That was a sale of goods by description by one dealer to another dealer. Both parties were taken to rely upon the description of the goods sold which was founded on an inspection and branding under inspection laws. Apparently it was a sale of specified goods under a trade name such as is now covered by § 15 (4) of the sales act, and where there is no implied warranty of fitness for any particular purpose. It is pointed out in the opinion in that case, at page 62, that it was not intended to apply to sale of food at retail for immediate use. It is to be noted that *Walden v. Wheeler*, 153 Ky. 181, and *Bigelow v. Maine Central Railroad*, 110 Maine, 105, 110, each arose at common law and not under a sales act. But if and so far as they are inconsistent with the conclusion here reached, we cannot follow them.

No discussion is required to demonstrate that canned beans and pork are not fit for consumption if they contain a pebble of sufficient size to break a tooth. It is matter of common knowledge that pebbles often are found in raw and uncleaned beans. In domestic use, careful sorting is required to free them from such substance. It is or may be found lack of due care for one to prepare beans for eating with pebbles still among them. See *Watson v. Augusta Brewing Co.* 124 Ga. 121.

It follows that the plaintiff is entitled to recover, and since it is agreed that his damages are \$350, judgment may be entered in his favor for that sum.

*So ordered.*



CROSBY, J. I cannot agree with the decision of the majority; and as the question presented has not before arisen in this court, I feel it to be my duty that I should state my views.

The plaintiff received an injury to his tooth while eating baked beans among which was a small pebble. The beans were purchased by the plaintiff at the defendant's store, and were contained in a sealed tin can. They were purchased by the defendant, with other beans in tin cans, from the manufacturer, the Thomas Canning Company, of Grand Rapids, Michigan. The labels upon all the cans described the defendant merely as "Distributors." There is nothing to indicate that the defendant prepared or manufactured the contents, — no contention to that effect is made; and it is not contended that the presence of the pebble in the can, or the plaintiff's injury, was due to any negligence whatever on the part of the defendant. Although it is stated in the opinion that "It is or may be found lack of due care for one to prepare beans for eating with pebbles still among them," I do not understand the opinion to hold the defendant liable for negligence, but upon an implied warranty that the beans in the can were free from foreign substances and fit for human consumption.

The case comes before us by report on a case stated, in which it appears that the beans purchased by the plaintiff "were canned in a tin can such as is ordinarily used for such canning, and at no time after the sealing of the can and until it was opened by the plaintiff was there any visible indications that the contents were in any way defective or that the can contained any foreign substance. . . . The defendant had no supervision of the process of canning these beans and had no knowledge or means of knowledge of the presence of the pebble in the can. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company is and was at all times an independent reputable manufacturer of canned goods, and in its canning process employed all modern methods to prevent the presence of foreign substances in its canned products. The products of the company were widely distributed and were considered by the wholesale and retail stores which handled them to be of good quality."

It is provided by our sales act, St. 1908, c. 237, § 15 (1), "Where the buyer, expressly or by implication, makes known

to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

The above quoted clause of the act does not differ from the rule as it existed before the enactment of the statute, but is declaratory of the common law so far as pertinent to this case.

I agree that the transaction was a purchase and sale of food to be eaten, and was so understood by the defendant. Notwithstanding this fact, in order that it may be charged upon an implied warranty that the goods sold shall be fit to be eaten, it must further appear, both at common law and under the act, "that the buyer relies on the seller's skill or judgment;" unless there is something to show that the plaintiff relied on the defendant's skill or judgment it is plain that the defendant cannot be charged with liability upon an implied warranty. That the plaintiff relied on the skill or judgment of the defendant in making the purchase, is not expressly stated in the report; nor, in my opinion, can it reasonably be inferred from the facts stated.

It appears that the cans in the defendant's stock of canned goods from which the plaintiff made the purchase in question were labelled alike, all were sealed, and their appearance was so similar that there was no way in which the contents of one could be distinguished from another. The fact that the cans were sealed made inspection of their contents before the sale impossible. It may fairly be inferred that it was necessary, in order to preserve the contents, that the cans should be sealed. There was no way in which the defendant as a seller could inspect or analyze or otherwise determine the quality or fitness of the contents of the cans before they were sold by him.

It was his duty to furnish to his customers goods of a reputable brand, properly inspected and prepared in accordance with approved methods, and purchased of a reputable manufacturer. It is agreed that in all respects the defendant fully complied with these requirements. While the plaintiff could make no intelligent selection based upon an observation of the can containing the beans, his situation was the same as that of the defendant. The position of a purchaser and that of a seller in selecting a par-

ticular can so as to be able to judge of the quality, wholesomeness and fitness for food of its contents, are identical. Under such a sale of canned goods, it seems plain that the buyer does not rely on the seller's skill or judgment: the buyer knows that the article he purchases is in a sealed can; he knows that it is impossible for the seller to have any more knowledge of the contents of the can than he (the buyer) has. They are in precisely the same situation, — they are upon an equal footing. How, then, can it be said that the buyer relies upon the skill or judgment of the seller? How can it reasonably and fairly be inferred from the agreed facts in this case that the plaintiff relied upon the skill or judgment of the defendant in selecting the can sold to him (the plaintiff) when the latter was fully aware of the fact that the defendant could not possibly have any knowledge of its contents? In my opinion, upon the facts stated, to infer that the plaintiff relied on the defendant's skill or judgment would be wholly unwarranted. The reasoning of the able opinion in *Bigelow v. Maine Central Railroad*, 110 Maine, 105, seems to me to apply with equal force to this case.

I am aware that in some jurisdictions a seller of food in sealed cans has been held liable upon an implied warranty, but it does not seem to me that such decisions are in accordance with sound principles. The rule which governs where a piece of meat, or other article of food which is open to examination and inspection, is sold, has no application to a sale of canned goods under the circumstances as described in the present case.

The case of *Farrell v. Manhattan Market Co.* 198 Mass. 271, and similar cases, are clearly distinguishable upon the ground that the buyer in purchasing canned goods does not and cannot in the nature of things rely upon the skill or judgment of the seller. The distinction between a sale of provisions which are open for inspection and those which are sold in sealed packages or closed cans was pointed out by Chief Justice Shaw in *Winsor v. Lombard*, 18 Pick. 57, at page 62, and referred to in *Bigelow v. Maine Central Railroad*, *supra*. In the case last referred to, it was said at pages 110 and 111, that if the rule laid down in *Winsor v. Lombard* is to be followed, "the only possible conclusion is, that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly

what she ordered. She, therefore, assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent, with the practical use of the product, to test its quality."

In the absence of negligence, I do not think the defendant should be held liable. The effect of the decision of the majority is to charge it with liability as an insurer. It would seem to be more in accord with the principles of justice and reason to hold that the plaintiff should seek his remedy against the manufacturer who alone caused the injury.

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ARTHUR N. HOLCOMBE & another vs. WILLIAM P. CREAMER  
& others.

Suffolk. December 7, 1917. — September 18, 1918.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

*Minimum Wage Commission. Constitutional Law. Words, "Decree."*

The provisions of the statute creating the minimum wage commission, contained in St. 1912, c. 706, as amended, which are not mandatory as to rates of wages, contain no words of compulsion either upon employer or employee and do not restrain freedom of action by either employer or employee as to the wages to be paid or received, are not in violation of any of the articles of the Declaration of Rights nor in violation of the Fourteenth Amendment to the Constitution of the United States.

The provisions of the statute creating the minimum wage commission in no way exceed the limits of the right of the public to inquire into private affairs.

Nor are the provisions of that statute open to objection as an unconstitutional delegation of legislative power.

The facts which the minimum wage commission is authorized to ascertain and the evidence which it is empowered to seek from employers cannot form the basis of a criminal proceeding, because no crime is created and no prosecution is provided for.

It here was unnecessary to consider the provisions relating to newspapers contained in St. 1912, c. 706, §§ 15, 16, of the statute creating the minimum wage commission, because those provisions were not before the court, but it was pointed out, that, even if those provisions should be found to transcend in any way the power of the Legislature under the Constitution, they are quite separable from the rest of the statute.

It also was said that the grounds on which the decision was based made it wholly unnecessary to consider the question, whether a mandatory minimum wage

law would violate the provisions of our Constitution or the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

PETITION, filed in the Supreme Judicial Court on January 7, 1916, by the members of the minimum wage commission established under St. 1912, c. 706, amended by St. 1913, cc. 330, 673, and St. 1914, c. 368, for an order of the court compelling certain witnesses to testify before the commission.

The case was heard by *Braley, J.*, who found that the facts as proved or admitted were as stated in the findings of fact annexed to his report. The counsel for the respondents asked "that the right to try out the question of the regularity of the proceedings precedent to the establishment of the laundry wage decree by the minimum wage commission be reserved without prejudice for determination in any other proceeding." The single justice granted this request. The counsel for the respondents then asked the single justice to rule that the minimum wage commission statutes, St. 1912, c. 706, and acts in amendment thereof, were unconstitutional. The justice refused so to rule, and ordered process to issue as prayed for. At the request of the respondents he reported all questions of law involved for determination by the full court.

*E. M. Sullivan*, for the respondents.

*A. D. Hill*, (*J. G. Palfrey & H. W. Brown* with him,) for the petitioners.

*Rugg, C. J.* The question presented by this record is the constitutionality of St. 1912, c. 706, as amended by St. 1913, cc. 330, and 673, and St. 1914, c. 368, establishing the minimum wage commission. Sections 1 and 2 of the act regulate the appointment, compensation, clerical assistance and office accommodations of the commission. Section 3 states its duty to be "to inquire into the wages paid to the female employees in any occupation in the Commonwealth, if the commission has reason to believe that the wages paid to a substantial number of such employees are inadequate to supply the necessary cost of living and to maintain the worker in health." Section 4 authorizes the commission, when of opinion after investigation that the wages of a substantial number of women in any occupation are thus inadequate, to form a wage board composed of an equal number of representatives of the employers and of the employees in the specified industry and of one or more representatives of the public, not exceeding one half the

number of the representatives of either of the other parties. Section 5 empowers the commission to send to such wage board all pertinent information in its possession relative to the wages in the occupation in question, and requires that the wage board, after taking into consideration "the needs of the employees, the financial condition of the occupation and the probable effect thereon of any increase in the minimum wages paid, and shall endeavor to determine the minimum wage, whether by time rate or piece rate, suitable for a female employee of ordinary ability in the occupation in question, or for any or all of the branches thereof, and also suitable minimum wages for learners and apprentices and for minors below the age of eighteen years. When two thirds of the members of a wage board shall agree upon minimum wage determinations, they shall report such determinations to the commission, together with the reasons therefor and the facts relating thereto, and also the names, so far as they can be ascertained by the board, of employers who pay less than the minimum wage so determined." Section 6 directs the commission to review each report made by a wage board, empowering it to approve or to disapprove any or all of its determinations, or to recommit the subject to the same or a new wage board. If the commission approves any or all of the determinations of the wage board it shall then, after seasonable notice, give a public hearing to all employers paying less than the minimum wage thus tentatively approved. If, after such public hearing, "the commission finally approves the determination, it shall enter a decree of its findings and note thereon the names of employers, so far as they may be known to the commission, who fail or refuse to accept such minimum wage and to agree to abide by it." The commission shall publish a summary of its findings and its recommendations and the facts as it finds them to be as to the acceptance of its recommendations by employers in the given industry, together with the names of those adopting or refusing to follow such recommendations. By § 14 the commission is vested with power to reinvestigate these facts from time to time thereafter and to publish the names of employers failing to observe its recommendations. Any employer, who files a declaration under oath to the effect that compliance with the recommendations of the commission would render it impossible for him to conduct his

business at a reasonable profit, shall be entitled to a review of such recommendations by the Supreme Judicial Court or the Superior Court according to equity procedure. If the court finds that the averments of the declaration are sustained, it may restrain the publication of the complainant's name, but not otherwise affect the determination of the commission. Section 8 provides for reinvestigation after a minimum wage has been established, with the same procedure as in an original inquiry. Section 9 authorizes the commission to issue special certificates for employment in certain instances to women physically defective. Section 10 confers upon the commission similar powers respecting wages paid to minors in any occupation in which the majority of employees are minors. Section 11 enjoins employers to keep registers of the names, addresses, occupation and weekly wages of women and minor employees and to submit them to the commission or director of the bureau of statistics on request. Section 12 relates to the gathering of statistics. Section 13 prohibits employers from discrimination against employees because of testifying or serving on a wage board or giving information concerning conditions of employment. Section 15 imposes a penalty upon "any newspaper refusing or neglecting to publish the findings, decrees or notices of the commission at its regular rates for the space taken," and § 16 exonerates the members of the commission and publishers of newspapers from actions for damages for publishing the names of employers in accordance with the act "unless such publication contains some wilful misrepresentation."

The facts in the case at bar are that proceedings were had in accordance with the terms of the act respecting wages paid female employees in laundries. A determination finally was made by the commission fixing a minimum weekly wage schedule varying according to experience in the work from \$6 to \$8. No review of this determination appears to have been sought in the courts. Publication thereof was made as provided in the act. Thereafter the commission proceeded to investigate wages actually paid to such employees in order to ascertain what employers were complying with its recommendations. The respondents, who are owners or officers of corporate owners of laundries, refused to furnish the required information. This proceeding is brought to compel them to do so.

It is manifest from the summary of its various provisions that the act is not mandatory as to rates of wages. It contains no words of compulsion upon either employer or employee. It does not restrain freedom of action by either employer or employee as to the wages to be paid or received. Any woman and her employer may make and enforce any agreement respecting compensation for her labor unhampered by any provision of the act. There is no constraint affecting property or conduct. The act does not purport to exercise any check with respect to liberty of contract, use of property, or management of business. The act does not require payment to any woman or minor of more than fair compensation, however small it may be. It does not prevent one or any number of women, who do not desire for any reason to earn their entire support by labor, from working for less wages than recommended by the commission. It does not prohibit any employer from contracting for the services of such women for any compensation mutually agreed upon. There may be divers reasons why such contracts may be wanted by working women, such as physical or mental weakness and consequent inability to earn the full wage, reliance upon other sources of income or support, and desire to work for short time in order that remaining hours may be devoted to study or other activities. These considerations are left to operate to their full extent without hindrance from the statute. The chief purpose of the act as gathered from its words is that there shall be an investigation as to facts, a statement of the conclusions drawn from those facts and a making public of those conclusions, all by or under the supervision of an administrative board. The utmost bound of the authority of the commission is to make recommendations. It cannot issue any order. Although in several places in the act occur the words "decree," "decrees" and "decree of its findings," it is manifest that they signify only advisory suggestions and not authoritative directions. "Decree" is not used in its judicial sense in the statute. It is the equivalent of a counsel succinctly stated. This is true also of the words "obeying its decrees" in § 14, where it is plain from the context that they mean only following its recommendations. In its strictly legal signification a decree is the formal expression of a final decision, which can be issued only by a court clothed with jurisdiction to compel obedience to that decision by



invoking the power of the State to that end, so far as necessary. The whole act shows that "decree" used in this statute was not intended to have any such meaning.

Doubtless one aim of the act is to bring to bear the force of public opinion in support of the acceptance of the recommendations of the commission. This may be a kind of coercion. But it can go no further than ascertained and published facts induce members of the public as individuals to the action of giving or withholding custom or patronage. The public money could not be expended for the support of the commission unless its functions related to a public as distinguished from a private matter. It hardly can be pronounced a matter utterly devoid of common interest to ascertain whether and to what extent substantial numbers of working women are receiving wages "inadequate to supply the necessary cost of living and to maintain the worker in health." Restraint upon freedom of contract by women and children has been recognized as an appropriate exercise of the police power in numerous cases. See, for example, *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489; *Commonwealth v. Riley*, 210 Mass. 387; *Desmond v. Young*, 173 Mass. 90. The kind of constraint, which may arise from making public facts and conclusions at the expense of the Commonwealth, would involve other considerations if directed to affairs in which there could be no legitimate general interest directed to the rational promotion of the public health, order, morals and in a restricted sense the common welfare.

Merely for the purpose of illustrating the extent of the public interest in matters involving primarily and chiefly private concerns, numerous decisions are pertinent.

Interference with liberty of contract by employer and employee to the extent of requiring weekly payments of wages, *Opinion of the Justices*, 163 Mass. 589, and of limiting the hours of labor of women and minors, *Commonwealth v. Hamilton Manuf. Co.* 120 Mass. 383, *Commonwealth v. Riley*, 210 Mass. 387, *Commonwealth v. John T. Connor Co.* 222 Mass. 299, has been sustained. Freedom of contract as to small loans has been seriously curtailed by statutes which have withstood attacks upon their constitutionality. In *Commonwealth v. Danziger*, 176 Mass. 290, the requirement of a license for those making such loans was sus-

tained. The rate of interest to be charged may be limited, *Dewey v. Richardson*, 206 Mass. 430. Statutes circumscribing the freedom of contract by wage earners in assigning pay to be earned in the future, to the extent of restricting the time during which such assignments may run, *McCallum v. Simplex Electrical Co.* 197 Mass. 388, and requiring acceptance of assignment by employer and assent by the wife of employee, *Mutual Loan Co. v. Martell*, 200 Mass. 482, affirmed in 222 U. S. 225, have been upheld. Usury laws have been recognized as valid, usually without discussion as to constitutionality, although an invasion of freedom of contract. Numerous of our own decisions proceed upon that footing. See also *Griffith v. Connecticut*, 218 U. S. 563. It was decided in *John P. Squire & Co. v. Tellier*, 185 Mass. 18, that St. 1903, c. 415, which provided that sales of merchandise in bulk, not in the ordinary course of trade, should be void against the creditors of the seller unless made after compliance with certain requirements for the information and protection of creditors, was not an unconstitutional interference with liberty of contract. To the same effect see *Lemieux v. Young*, 211 U. S. 489. The opinion has been expressed that contracts for prices discriminating between different parts of the Commonwealth, for the purpose of destroying competition, may be prohibited. *Opinion of the Justices*, 211 Mass. 620. A decision to the same point is *Central Lumber Co. v. South Dakota*, 226 U. S. 157. The prohibition of the sale of goods without license from stores temporarily leased was upheld in *Commonwealth v. Crowell*, 156 Mass. 215. R. L. c. 65, § 1. In *Commonwealth v. Strauss*, 191 Mass. 545, a statute making it a criminal offence to require as a condition in the sale of goods that the purchaser should not sell or deal in the goods of any other person than the seller was sustained. Scarcely any form of contract is more common than that of insurance. Yet a large variety of statutes interfering with freedom of contract upon that subject have been supported. For example, the form of the contract may be prescribed by the Legislature, *Considine v. Metropolitan Life Ins. Co.* 165 Mass. 462, 466, or determined in the first instance by an administrative officer, *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 198, and cases there collected; parties may be forbidden to agree that misrepresentations in the negotiations for insurance made without intent to deceive and not

increasing the risk of loss, shall avoid the policy, *Nugent v. Greenfield Life Association*, 172 Mass. 278; and parties may be prohibited in casualty insurance from contracting that the insured must pay his loss before being permitted to recover from the insurer, *Lorando v. Gethro*, 228 Mass. 181.

The Supreme Court of the United States has upheld statutes requiring employers who pay wages in scrip, store orders, or other evidences of indebtedness, to redeem them in cash, *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224, forbidding persons to deal in stocks on margin, *Otis v. Parker*, 187 U. S. 606, proscribing a fee in excess of \$10 to any person for preparing and prosecuting a pension claim, *Frisbie v. United States*, 157 U. S. 160, 165, prohibiting contracts to pay wages less often than twice each month, *Erie Railroad v. Williams*, 233 U. S. 685, making illegal the sale of lard in bulk in small quantities or except in containers holding designated weights, *Armour & Co. v. North Dakota*, 240 U. S. 510, inhibiting the sale of loaves of bread of other than standard weights fixed by the statute, *Schmidinger v. Chicago*, 226 U. S. 578, see *Commonwealth v. McArthur*, 152 Mass. 522, prohibiting washing and ironing in public laundries between specified hours, *Barbier v. Connolly*, 113 U. S. 27, requiring wages earned but not due to be paid immediately upon discharge, with or without cause, of any servant or employee, regardless of contract respecting the subject, *St. Louis, Iron Mountain & St. Paul Railway v. Paul*, 173 U. S. 404, changing the rules of the common law as to fellow servants, assumption of risk, contributory negligence and recovery for death caused by negligence, and prohibiting contracts to avoid the effect of that change, *Second Employers' Liability Cases*, 223 U. S. 1, 49-52, *Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U. S. 603, and forbidding the manufacture of oleomargarine, *Hammond Packing Co. v. Montana*, 233 U. S. 331. Taxation to the extent of prohibition of contracts as to trading stamps has been upheld. *Rast v. Van Deman & Lewis*, 240 U. S. 342, 368. A statute making it unlawful to pay miners employed at quantity rates upon the basis of screened coal instead of its weight as originally mined in mines where ten or more men were employed underground, has been decided not to violate the Fourteenth

Amendment to the Federal Constitution. *McLean v. Arkansas*, 211 U. S. 539. An act of Congress prohibiting the payment in advance of seamen's wages to be earned in interstate or foreign commerce does not violate constitutional freedom of contract. *Patterson v. Bark Eudora*, 190 U. S. 169. The validity of legislation penalizing the sale of cigarettes without license, *Gundling v. Chicago*, 177 U. S. 183, prohibiting contracts for options to sell or buy grain or other commodity at a future time, *Booth v. Illinois*, 184 U. S. 425, barring the employment of women more than a limited number of hours per day or week in manufacturing or mechanical establishments, *Riley v. Massachusetts*, 232 U. S. 671, *Miller v. Wilson*, 236 U. S. 373, forbidding contracts between employer and employee limiting the right of the latter to recover damages at common law, *Chicago, Burlington & Quincy Railroad v. McGuire*, 219 U. S. 549, and prescribing the particular method of compensation to be paid by employers to miners for the production of coal, *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, has been sustained against attacks founded on interference with the freedom of contract secured by the Fourteenth Amendment to the United States Constitution. A statute imposing an absolute duty upon the owner to provide safeguards for machinery in manufacturing establishments has been held to prohibit a contract against liability arising from a failure to comply with the statute even with one expressly employed to furnish and install such safeguards. *Bowersock v. Smith*, 243 U. S. 29. In most if not all of these cases it also was held that the statutes did not deprive anybody of property without due process of law, or of the equal protection of the law.

Reference is made to these authorities solely to indicate the range of the public interest respecting matters of private relations, and not to intimate whether they afford any foundation for a compulsory minimum wage law. These decisions rest at bottom on the proposition that the public welfare in respect to health, morals and safety bears so close a relation to the subjects dealt with in the several statutes as to justify legislative regulation.

The present act may have had its origin in the belief that women and minors in some branches of industry, under the constraint of necessity to earn their living, were working for wages less

than enough to provide them support in healthful surroundings as to food, clothing and home and under conditions suitable for the normal activity of the moral faculty. In its broad aspects this general subject is one having some relation to the welfare of the community. The ascertainment of the facts respecting this subject at a given time and the making of recommendations for the remedy of evil conditions, if found to exist, by a temporary commission acting under the sanction of public authority, would be a lawful expenditure of public moneys. It does not seem to us unreasonable to contend that wages insufficient for the bare essentials of the cost of support and the nourishment of the health of women laborers have such relation to the public morals, good order and health that the dissemination of information upon the subject of such wages from time to time by a permanent commission is within the power of a Legislature clothed, as is our General Court, with full power and authority to make "all manner of wholesome and reasonable" statutes not repugnant to the Constitution. The circumstance that the commission further is directed to make recommendations as to wages to be paid, does not add an element of compulsion in law in connection with all the other factors. The recommendation in the nature of things must correspond more or less closely to the facts found. The members of the public are free to decide from the facts stated and their own experience whether the conclusions of the commission are just and wise or oppressive and vain, and to act according to their own conceptions of their private advantage and the public welfare. It is not for us to pass upon the question whether such legislation is wise. Unless it can be said to bear no relation whatever to legitimate public interests or to be a palpable invasion of private right, liberty and property without constitutional warrant, the decision of the General Court as embodied in the statute must stand.

The natural and inalienable rights are secured to each member of society by arts. 1, 10 and 12 of the Declaration of Rights of our Constitution to enjoy liberty, to acquire, possess and defend property and to seek and obtain safety and happiness, and to be protected by law in the exercise of these rights. Freedom of contract in a broad sense is a constitutional right. "Liberty" as used in the Fourteenth Amendment to the Constitution of the

United States, said Mr. Justice Harlan, "embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper.' *Allgeyer v. Louisiana*, 165 U. S. 578, 589." *Lottery Case*, 188 U. S. 321, 357. *Booth v. Illinois*, 184 U. S. 425, 428, 429. *Adair v. United States*, 208 U. S. 161, 173. *Coppage v. Kansas*, 236 U. S. 1, 14. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 251. "Liberty" wherever it occurs in the Declaration of Rights of the Constitution of this Commonwealth has at least as comprehensive a meaning. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478. *O'Keeffe v. Somerville*, 190 Mass. 110. *Gleason v. McKay*, 134 Mass. 419. *Opinion of the Justices*, 208 Mass. 619, 622. *Bogni v. Perotti*, 224 Mass. 152. But these guarantees are subject to the police power. Without undertaking to define that power, it comprehends rational action by the legislative department for the protection of the public health, morals and good order. These guarantees do not go to the extent of protection against publicity respecting contracts with women and minors, which the consensus of opinion of the Commonwealth, as formulated in a statute requiring impartial investigation by a public board, declares wanting in affording to them necessary support. Assuming that these and other constitutional safeguards protect the individual in the enjoyment of privacy, they do not afford immunity against police regulations requiring knowledge touching subjects which may within reason be thought to promote the health, safety and morals of the community.

There are limits to the right of the public to inquire into private affairs. The coercion resulting from legislation, in form not compulsory, may in practice be so severe as to leave no alternative save compliance. In such a case its validity would depend not upon its form but its substance. But it is not necessary to discuss limitations of this character, for the reason that the present statute does not according to its terms reach into that realm. There is nothing in the record to warrant the inference that such is its actual effect. The inducements held out by this act to employers to accept the recommendations of the commission in principle do not go beyond those of the workmen's com-

pensation act, which abolished the defences of assumption of risk, contributory negligence, and the fellow servant doctrine as to employers who do not become subscribers, but left those rules of law in force without the benefit of the employers' liability act as to employees who elect to rely upon their common law rights. Yet that act has been held valid as not depriving the employer or employee of property without due process of law, limiting unduly freedom of contract, or interfering with other constitutional rights. *Young v. Duncan*, 218 Mass. 346. *Opinion of the Justices*, 209 Mass. 607.

As has been pointed out, the present statute does not impair liberty of contract. Absolute freedom to make any contract respecting wages is left untouched. Notwithstanding its terms, still "An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them." *Vegetahn v. Guntner*, 167 Mass. 92, 97. The right of every man is undisturbed "to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can." *Carew v. Rutherford*, 106 Mass. 1, 14. *Opinion of the Justices*, 163 Mass. 589, 595. *Commonwealth v. Perry*, 155 Mass. 117.

There is no undue invasion of the right of privacy assuming that that is an element of the constitutional right to seek and obtain "safety and happiness."

The principles on which the boycott and blacklist are held unlawful, as set forth in *Pickett v. Walsh*, 192 Mass. 572, *Burnham v. Dowd*, 217 Mass. 351, *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, and other decisions, have no application to the official publications authorized by this statute.

The statute does not take property of the employer for the reasons already stated.

Since the statute is not compulsory either in form or effect, there is no ground for holding that it is invalid because not affording equal protection of the laws. Whatever might be said about certain provisions of the act in this regard, if it were mandatory, there is no occasion now to discuss that matter. The principles

declared in *Opinion of the Justices*, 220 Mass. 627, 631, *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 111, and *Barrett v. Indiana*, 229 U. S. 26, 30, are not applicable.

The analysis of the act already made demonstrates that it is not open to objection as an unconstitutional delegation of legislative power. In this respect the statute is well within the authority of numerous decisions. *Brodline v. Revere*, 182 Mass. 598. *Commonwealth v. Kingsbury*, 199 Mass. 542. *Commonwealth v. Sisson*, 189 Mass. 247. *Commonwealth v. Hyde*, 230 Mass. 6. *Boston, petitioner*, 221 Mass. 468. It is plain also that it does not confer judicial powers upon the commission. *Nelson v. State Board of Health*, 186 Mass. 330. *Dinan v. Swig*, 223 Mass. 516, 520. It follows that the statute does not violate art. 30 of the Declaration of Rights. *Boston v. Chelsea*, 212 Mass. 127.

There is no criminal element about the act so far as it concerns the employer. The facts which the commission is authorized to ascertain and the evidence which it is empowered to seek from employers cannot form the basis of a criminal proceeding, because no crime is created and no prosecution is provided for. Revealing the information or answering the questions required by the statute cannot subject the employer to penalty or forfeiture, and does not expose him to imputation of crime. Therefore the constitutional prohibition against a subject being "compelled to accuse, or furnish evidence against himself" is not violated. Art. 12 of the Declaration of Rights. *Commonwealth v. Willard*, 22 Pick. 476, 477. It follows that there is no foundation for the contention of the respondents that they are subjected to punishment without proper notice, or complaint, or hearing, or trial by jury.

It is not necessary to consider the scope and validity of § 15 of St. 1912, c. 706, which purports to compel newspapers to publish notices and findings of the commission at its regular rates for space, and of § 16, which purports to exonerate the commission and publishers and proprietors of newspapers from liability for damages for such publication, except for wilful misrepresentation. Those sections are not involved on this record and are left entirely open for future consideration. Even if they should be found to transcend in any respect the power of the



Legislature under the Constitution, they are quite separable from the rest of the act. It cannot be thought that the rest of the statute would not have been enacted without them, and therefore the constitutionality of the sections here assailed would not be affected. *Ashley v. Three Justices of the Superior Court*, 228 Mass. 63, 81, and cases there collected. *Brazee v. Michigan*, 241 U. S. 340.

The act as it has been interpreted does not seem to us to violate any provision of the Fourteenth Amendment to the United States Constitution. The reasons upon which this decision rests, as already stated, appear to us to make this conclusion clear. Holding ourselves strictly bound by the decisions of the United States Supreme Court upon which the respondents rely, such as *Coppage v. Kansas*, 236 U. S. 1, 17, 18, *Adair v. United States*, 208 U. S. 161, *Smith v. Texas*, 233 U. S. 630, *Lochner v. New York*, 198 U. S. 45, (see *Bunting v. Oregon*, 243 U. S. 426,) *Japanese Immigrant Case*, 189 U. S. 86, 100, *Loewe v. Lawlor*, 208 U. S. 274, *Gompers v. Bucks Stove & Range Co.* 221 U. S. 418, 437, 438, 439, *Hawkins v. Bleakly*, 243 U. S. 210, *Cummings v. Missouri*, 4 Wall. 277, 320, 327, *Louisville & Nashville Railroad v. Garrett*, 231 U. S. 298, 307, and *Yick Wo v. Hopkins*, 118 U. S. 356, none of them in our opinion are at variance with the result here reached.

The grounds upon which this decision is put make wholly unnecessary consideration of the question whether a mandatory minimum wage law would violate the provisions of our Constitution. They also render superfluous a prophecy whether such an act will be held by the United States Supreme Court to be contrary to the rights and liberties guaranteed by the Fourteenth Amendment to the United States Constitution. See, in this connection, *Stettler v. O'Hara*, 69 Ore. 519, affirmed by an equally divided court, Mr. Justice Brandeis taking no part in the consideration and decision, in *Stettler v. O'Hara*, 243 U. S. 629, *State v. Crowe*, 130 Ark. 272, *Williams v. Evans*, 139 Minn. 32, and *Larsen v. Rice*, 171 Pac. Rep. 1037.

*Writ to issue.*

HARRY B. DUANE vs. MERCHANTS LEGAL STAMP  
COMPANY & others.

HARRY B. DUANE & another vs. SAME.

Suffolk. March 19, 1918. — September 21, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, & CARROLL, JJ.

*Equity Jurisdiction*, No aid between wrongdoers. *Wrongdoer without Remedy.*  
*Constitutional Law.*

In a suit in equity by one of the stockholders of a trading stamp corporation, which had conducted a monopolistic business in violation of St. 1908, c. 454, against the corporation and the other parties to the enterprise, it was said that, "The theory of the law is that general morality and business integrity are best promoted by not undertaking to aid repentant participants in executed illegal transactions" and by leaving them without remedy against one another.

*Duane v. Merchants Legal Stamp Co.* 227 Mass. 466, affirmed and declared not to be distinguishable from *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393.

It also was held, that no federal question was raised in the present case of *Duane v. Merchants Legal Stamp Co.* and, moreover, that, if such a question was raised, the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws.

BILL IN EQUITY, finally filed in the Supreme Judicial Court in its amended form on September 21, 1917, by a stockholder of the Merchants Legal Stamp Company, a business corporation organized under the laws of this Commonwealth, containing the allegations described in the opinion and praying for the following relief:

"1. That the individual defendants be enjoined from continuing to manage the affairs and conduct the business of the stamp company in violation of St. 1908, c. 454, or any other law or laws of this Commonwealth, and from imposing or enforcing in the management of its business or in the sale or distribution of stamps any restrictions which are in violation of said laws.

"2. That the individual defendants be enjoined from refusing to supply said Houghton and Dutton Company or any other merchants with stamps on reasonable and lawful terms under the pretence or upon the ground that they are authorized in such refusal by the terms of paragraph 7 of contract 'A.'

"3. That an account be taken of the loss of lawful profits

which the stamp company has suffered since January 1, 1915, by reason of the said illegal conduct of the defendant directors, and that the directors be ordered to pay the amount of such losses to the Stamp Company.

"4. For such further and general relief as to the court shall seem meet."

Also another

BILL IN EQUITY, filed November 5, 1917, between the same parties except that the Ginter Grocery Company, the beneficial owner of the shares of the defendant corporation held by the plaintiff Duane, was joined as a plaintiff, the allegations being described in the opinion. The relief prayed for was as follows:

"1. That the defendants be ordered by this honorable court to recognize the rights of the plaintiff Duane as a stockholder in said corporation, and to receive in common with other stockholders dividends in the proportion of his stock holdings.

"2. That an account be taken of the profits and dividends which have been divided by the defendant corporation between its stockholders under the pretended authority of said contracts 'A' and 'B' since January 18, 1915, and that the defendants be ordered to pay to the plaintiff Duane on account of such profits the dividends to which he is entitled as such stockholder.

"3. That the defendants be enjoined from distributing the profits of the business among the stockholders in proportion to the purchase of the stamps by them or the firms or corporations which they represent, and be enjoined from making any distribution of such profits until the further order of this court.

"4. That the defendants be enjoined from continuing to manage the affairs and business of the corporation in violation of the laws of this Commonwealth or in violation of St. 1908, c. 454.

"5. That in the meantime, until the further order of this court, a receiver for the defendant corporation be appointed by this honorable court to hold possession of its property and to manage its affairs and business in accordance with the laws of this Commonwealth and under the court's direction."

These are in substance the same as the prayers contained in the bill filed on June 10, 1916, which was before this court when the decision reported in 227 Mass. 466 was made.

In each of the suits the defendants demurred to the bill as amended, and the cases were heard upon the demurrers by *De Courcy, J.*, who in each of the suits made an order that the demurrer be sustained and the bill be dismissed, and thereupon, at the request of the parties, reported the cases for determination by the full court.

*B. B. Jones*, for the plaintiffs.

*A. M. Lyman*, for the defendants.

RUGG, C. J. For convenience the individual and corporate plaintiffs will be referred to in this opinion as the plaintiff, the defendant corporation as the Stamp Company, and the other defendants as the directors.<sup>1</sup> The plaintiff alleges that he was a stockholder in the Stamp Company when it was incorporated, and still continues to be a stockholder. A suit between the same parties was considered in 227 Mass. 466. The kind of business of the Stamp Company and the means by which it was conducted there are narrated at length and need not here be repeated. It is enough to say that, according to the allegations of the bill in that suit, the business of the Stamp Company was that of supplying trading stamps; that it employed methods expressly designed to drive competitors from the field and to create a monopoly in that branch of trade, and that a monopoly had been established so that within this Commonwealth effectual rivalry practically had been eliminated; that the methods used in the promotion of the business and the establishment of the monopoly were in direct defiance of the prohibitions against monopolistic practices contained in St. 1908, c. 454, and therefore were unlawful, as was held in *Merchants Legal Stamp Co. v. Murphy*, 220 Mass. 281, and *Merchants Legal Stamp Co. v. Scott*, 220 Mass. 389. Instrumentalities adopted for the accomplishment of these ends were contracts referred to as "A," "B" and "C." The plaintiff, on the allegations of the bill there under consideration, as a stockholder and by contracts belonging to the most favored class of users of trading stamps, was an active participant in the unlawful methods and illegal practices of the Stamp Company. The purpose of that suit was stated in the decision of that case at page 468, in these words: "Although there is a prayer that the defendant corporation be restrained from continuing to manage its affairs and from conducting its business in violation of the anti-

monopoly act, St. 1908, c. 454, the frame of the bill and the burden of the complaint is for relief against discrimination toward the plaintiff in the distribution of the profits thus alleged to have been made illegally. As matter of construction it seems plain that the main purpose of the bill is to obtain for the plaintiff this money benefit by direct payment and by recognition as a shareholder, and the other allegations are incidental to that chief aim. Stripped of all subsidiary and ancillary matters, the real purpose of this bill is to procure through the aid of a court of equity a share in the profits of an illegal enterprise." That having been the construction of the allegations of that bill, and the foundation upon which the plaintiff then rested his contentions, the result was inevitable that the bill must be dismissed for the reason that courts do not supervise the distribution among wrongdoers of spoils derived from unlawful conduct. Parties to such affairs are left where their own acts put them. The law affords no help to any of them. In the light of the arguments then addressed to us, it did not seem necessary to elaborate further the reasons for that construction.

The consideration of the suits at bar must be approached with reference to that background. The historical allegations of the earlier suit touching the kind of business of the Stamp Company, the illegal methods by which it was prosecuted, and its monopolistic aim and accomplishments, are repeated in substance on the present records. Succinctly stated, the facts averred in the bills in the present suits are that the plaintiff in 1904 became one of several incorporators of the Stamp Company, a corporation organized for the purpose of carrying on the business of dealing in trading stamps. That was a legitimate enterprise. Its business was conducted in a lawful manner until 1907, when an illegal method was adopted by the Stamp Company whereby its stockholders as "insiders" were given a preference over those who were not stockholders or "outsiders," and a monopoly was established. These illegal methods, which were designed to give to the Stamp Company a monopoly of the trading stamp business and which actually produced that result, consisted chiefly of contracts "A," "B" and "C," the first two being executed between the Stamp Company and its stockholders and the third between the Stamp Company and its other customers. The

plaintiff himself executed contracts in the forms "A" and "B" with the Stamp Company, each dated May 17, 1907, for a term ending on April 11, 1924. In 1915 the essential provision of these contracts, whereby the Stamp Company carried on its business, were declared to be unlawful because tending to establish a monopoly and contrary to the statute. Thereupon the plaintiff notified the Stamp Company and the directors that he would no longer be bound by his contracts "A" and "B" with the Stamp Company and demanded that the use of the monopolistic contracts be discontinued and the business of the Stamp Company conducted according to law. Allegations to the effect that the monopoly will cease to exist with the cessation of the use of contracts "A," "B" and "C," and that it is not already so firmly entrenched that it will continue to be a monopoly even by the use of contracts normally lawful for a stamp dealer, are not clear or free from ambiguity, but without discussing or deciding that point we assume in favor of the plaintiff that they are sufficient. There is a further allegation to the effect that the defendants refuse to declare dividends in the Stamp Company to the plaintiff such as other stockholders receive, or to distribute to him his share of profits, on the ground of a pretended cancellation of the plaintiff's shares of stock in accordance with the terms of contract "A," because of his refusal to use the trading stamps of the Stamp Company as required by contracts "A" and "B." The plaintiff for a period of seven or eight years having been a party to illegal contracts and unlawful methods of business and having shared in the profits of that business, now asks the aid of a court of equity to compel the other party to the contract to cease to try to hold him to the terms of his contracts, which according to their terms are to run for several years more, and to abandon the use of illegal methods, to conduct the business according to law, and to recognize the plaintiff as a stockholder.

The controlling principle of law is well settled. The only difficulty lies in its application. Courts will not lend their aid to relieve parties from the unfortunate results of their own illegal adventures. The governing rule of law was stated by Chief Justice Knowlton with his usual comprehensive clearness and exact accuracy in *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.* 195 Mass. 356, 362, in these words: "It has been held

in many cases that, where the matters called for in the contract that render it illegal do not involve moral turpitude, but are merely *mala prohibita*, either party, while it remains executory, may disaffirm it on account of its illegality and recover back money or property that he has advanced under it. If the contract has been executed the court will not relieve either party from the consequences of his own violation of law. But so long as it is entirely unexecuted in that part which the law forbids, there is a *locus penitentiae*." That statement is supported by affluent citation of authorities there collected from the decisions of this court and from many other jurisdictions. It was that principle which was followed and applied when the parties were here in 227 Mass. 466. The same principle is equally applicable to the facts now alleged. The plaintiff and the Stamp Company and the directors have co-operated in rearing, promoting and making secure the monopolistic domination of the Stamp Company in its line of business, and in eliminating and excluding all effective competition. Their joint efforts through a series of years have produced the very mischief meant to be restrained and prevented by the statute. The contracts to which the plaintiff was a party purported to devote his property as a stockholder, together with that of his fellow shareholders, to the perpetration of this prohibited project for a definite term of years, and these contracts in the part forbidden by law have been executed for several of those years. The plaintiff has shared during those years in the profits of the scheme which have accrued through the operation of these illegal elements in the carrying on of the business, and he has shared in accordance with unlawful provisions of his contracts. In no right sense can it be said that the contracts of which the plaintiff complains remain "entirely unexecuted in that part which the law forbids." As to the illegal element, they have been executed in part and remain executory in part. Doubtless the contracts were void. It was the duty of the plaintiff and all the defendants as parties to them to obey the law, to repudiate the contracts, to renounce such business methods, and to abandon the monopoly. But according to the allegations of the bill all the defendants refuse to abrogate the contracts and pretend to continue to be bound by them, and persist in holding the plaintiff to the terms of the contracts to which he is a party.

The plaintiff cannot be under any liability for doing his duty in thus repudiating the illegal contracts and asking that the business be managed according to law. But on the other hand he cannot hold his confederates liable to himself for their failure or refusal likewise to abjure the illegal contracts and business methods. He cannot invoke the aid of the law to compel them to give up the partially executed illegal project and restore to him his property rights merely because he desires now to relinquish the prohibited and pursue the lawful course. The law refuses relief to the plaintiff not out of any tender regard for the defendants, but because the whole affair is so tainted with illegality that no assistance will be afforded to anybody culpably connected with its executed aspects. All are equally reprehensible respecting the very matter as to which relief is sought. The law does not undertake to discriminate as to degrees of guilt. The defence is allowed "not as a protection to the defendant, but as a disability in the plaintiff." *Myers v. Meinrath*, 101 Mass. 366. If the plaintiff were an innocent shareholder who had had no part in the illegal elements of the business so far as executed, and seasonably sought to restrain illegal business by the corporation, and there were appropriate allegations entitling a shareholder to proceed in behalf of the corporation, injunctive and other adequate relief would be afforded as of course. Courts of equity are swift to protect a minority stockholder against unlawful or oppressive conduct of a corporation. *Richardson v. Clinton Wall Trunk Manuf. Co.* 181 Mass. 580. *Adams v. Protective Union Co.* 210 Mass. 172. *Hill v. Murphy*, 212 Mass. 1. *Hayden v. Perfection Cooler Co.* 227 Mass. 589, 593. *Delaware & Hudson Co. v. Albany & Susquehanna Railroad*, 213 U. S. 435. It is only because this plaintiff in his capacity as shareholder is not innocent touching the very matter of which he now complains, but has been an active participant in the illegal factors of it which have been in considerable part executed, that the law refuses him relief. The theory of the law is that general morality and business integrity are best promoted by not undertaking to aid repentant participants in executed illegal transactions. "The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other." *Atwood v. Fisk*, 101 Mass. 363, 364.

The cases at bar seem to us wholly indistinguishable from *St.*



*Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393. The facts in that case were that one railroad company contrary to law had leased its property, equipment and franchise to another railroad company for a term of nine hundred and ninety-nine years, and pursuant to the provisions of the lease had delivered to the lessee all that was described in the lease. After the lapse of seventeen years the lessor railroad disavowed the lease on the ground of its illegality and sought the aid of a court of equity to recover possession of its property amongst other relief. It was said at pages 407 and 408 by Mr. Justice Gray: "The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. . . . When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. . . . The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract. Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches." The words of that decision were quoted at length and made the basis of the judgment in *Harriman v. Northern Securities Co.* 197 U. S. 244 at pages 295, 296. In *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393, the contract was not wholly executed. Indeed, it was executed only for a very small fraction of the term. The differences between that case and the cases at bar appear to us to relate to immaterial matters. The contract is not wholly executory in the cases at bar. It is partially executed only. But the test whether relief is

to be granted is, as was pointed out in *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.*, *ubi supra*, whether it is wholly unexecuted as to its illegal element. In the case at bar it was partially executed by all parties in respect of its illegal element.

There appears to us to be nothing contrary to this in the cases relied on by the plaintiff. In *Thomas v. West Jersey Railroad*, 101 U. S. 71, an illegal lease of a railroad was repudiated by the lessee, for which a fruitless effort was made to recover damages. All that was said in the opinion was directed to those facts. It was said in *Spring Co. v. Knowlton*, 103 U. S. 49, at page 58: "The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated." No discussion is required to show the wide difference between such facts and those here presented. The decision in *Sampson v. Shaw*, 101 Mass. 145, affords no support to the contention of the plaintiff. That was a case where the plaintiff and the defendant's testator entered into an illegal agreement to create a corner in a certain stock and the former deposited with the latter money to carry out the joint enterprise. It was held that if the plaintiff advanced and lent the whole fund to the defendant's testator upon the understanding that the unexpended balance, if any, should be returned, he could not recover. But if the direction given when the money was deposited was merely that the testator "from time to time should take from the fund enough to pay the plaintiff's proportion of the expenses incurred and investment made, to such extent as the necessities of the speculation should require, the unexpended balance . . . would not be considered as paid by the plaintiff on an illegal contract, but would be recoverable." The defendant was permitted to show the amount expended in order to show that the illegal element of the contract was not entirely executory. Manifestly the ordinary instance of repudiation of a wager before the stakeholder has paid over, such as *McKee v. Manice*, 11 Cush. 357, and *Morgan v. Beaumont*, 121 Mass. 7, is distinguishable from the cases at bar. *Block v. Darling*, 140 U. S. 234, 239, is equally distinguishable. So far as there

is anything inconsistent with this conclusion in *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, it is to the same extent inconsistent with *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393, and *Unckles v. Colgate*, 148 N. Y. 529, 538, 539.

There is an additional obstacle lying in the plaintiff's path, which did not exist in *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393, or even in *Mallory v. Hanaur Oil Works*, 86 Tenn. 598. The plaintiff alleges that the defendants, the Stamp Company and the directors, refuse to recognize him as a stockholder or to pay him dividends, or to distribute profits to him, because of a pretended cancellation of his shares of stock, and that acting under the feigned authority of contracts "A" and "B" a forfeiture of his shares of stock has been made. These acts are averred to be illegal because the contracts are illegal and also because their terms have not been complied with. But, although characterized as pretended, illegal and the result of unlawful conspiracy, the allegations of forfeiture and cancellation are definite and positive. One of the prayers, expressed in one bill and necessarily implied in the other, is that the defendants shall recognize the plaintiff as a stockholder and accord to him the rights of a stockholder as to dividends and otherwise. Thus the plaintiff is compelled by the exigencies of his situation to invoke the active interference of a court of equity to extricate himself from the alleged unlawful acts of the defendants, performed in pretended reliance upon the illegal contracts repudiated by him, in forfeiting and cancelling his shares of stock. The first element of his case to be established is that he is a stockholder. That lies at the threshold. If he cannot prove that, he has no standing. But in order to establish that essential fact, the acts of the directors and the Stamp Company in pretending to forfeit and cancel his stock must be declared void. That is an executed part of the illegal contract. The description in the pleadings of these acts as illegal and as done pursuant to the unlawful contracts and to a conspiracy, does not bridge the difficulty. If the cancellation and forfeiture has been in simulated conformity to the illegal contracts and thus apparently a corporate act, that unlawful conduct is one of the complaints of the plaintiff against which relief must be had, and in respect of which the court must

aid the plaintiff. But that is one part of the whole illegal scheme and must be so declared. It would be granting relief against an executed part of the contract to grant this prayer of the plaintiff. It appears to be essential to do this as a preliminary to affording any relief. Otherwise the plaintiff shows no private right. It seems to us to make no difference that these actions of the defendants took place after repudiation of the contracts by the plaintiff. Upon the allegations of the bill these acts are pretended to be in conformity to the authority conferred by the illegal contracts. The contracts by their terms are entire and not severable. They are executed in a particular as to which relief must be granted as a necessary pre-requisite to the general grounds alleged by the plaintiff. They occurred before any of his bills were filed. This circumstance in connection with all the other allegations appears to us to preclude the plaintiff from obtaining any relief.

In reaching this conclusion no lawful contract of the plaintiff, as stockholder or otherwise, is in any degree impaired.

The allegations to the effect that the plaintiff entered into the illegal arrangements in good faith and in full belief that they were lawful, and upon advice of counsel, are without avail. The plaintiff became a party to the illegal aspects of this business voluntarily, with a full knowledge of all the material facts, and did not act in consequence of mistake, fraud or accident. No new facts were subsequently disclosed. It was said in *Harriman v. Northern Securities Co.* 197 U. S. 244, at page 298, with reference to a like situation: "We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other." See also *Commonwealth v. Mixer*, 207 Mass. 141; *United States v. Anthony*, 11 Blatchf. C. C. 200; *State v. Goodenow*, 65 Maine, 30.

The offers to return the dividends already received from the illegal methods of doing business, and to do equity in that respect, are of no consequence in view of the other allegations. Penitence after participation in the execution of illegal elements of the transaction affords no ground for relief. *Myers v. Meinrath*, 101

Mass. 366. The grounds which have been stated and upon which this opinion rests are applicable equally to each suit. They appear to us to be decisive against the right of the plaintiff to maintain either suit.

The plaintiff contends that several federal questions are raised upon the present records, and that his rights under the Federal Constitution have been disregarded by the conclusion we have reached. He alleges and contends that his right as a stockholder in the Stamp Company is a contract entitled to protection under § 10 of art. 1 of the United States Constitution. That allegation and contention, however sound they may be in the abstract, *Clearwater v. Meredith*, 1 Wall. 25, are not relevant to any issue presented on these records. No statute of the Commonwealth is relied on or referred to as "impairing the obligation" of the plaintiff's contractual right arising from his status as a stockholder in the Stamp Company. It was said in *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, at page 638, respecting the force and effect of § 10 of art. 1 of the Federal Constitution: "This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the State. It does not reach mere errors committed by a State court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. But when the State court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the State court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired." Manifestly no federal question arises in this par-

ticular. *Moore-Mansfield Construction Co. v. Electrical Installation Co.* 234 U.S. 619, 624, 625. *McCoy v. Union Elevated Railroad*, 247 U. S. 354, 363.

The plaintiff further alleges and strenuously contends that his property is taken from him without "due process of law" and that he is denied "equal protection of the laws" in contravention of the guarantees of the Fourteenth Amendment to the Constitution of the United States.

On the allegations of the bills in the suits at bar the plaintiff was one of the incorporators of the Stamp Company. The purpose for which it was organized was the conduct of a lawful business. The plaintiff's right as a shareholder was property. It was entitled to all the protection afforded to property by the State and Federal Constitutions. It may not be doubted that the protection afforded by that amendment is available in appropriate instances against decisions by the State courts. Its prohibitions are directed to all instrumentalities of government within the several States, including judicial, executive and legislative. The law as administered, interpreted and enforced by the State courts may deprive one of his property without due process of law, or deny to one the equal protection of the laws as well as a statute enacted by the Legislature. If the State courts deny due process of law or equal protection of the laws to any one who seasonably raises the question, they are amenable to the corrective power of the Supreme Court of the United States. *Scott v. McNeal*, 154 U. S. 34. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226. *Muhlker v. New York & Harlem Railroad*, 197 U. S. 544. *Myles Salt Co. Ltd. v. Iberia & St. Mary Drainage District*, 239 U. S. 478, 484. *Saunders v. Shaw*, 244 U. S. 317, 320. That principle we recognize and accept in all its amplitude.

But it appears to us that that principle has no pertinency to the questions raised on this record. It is settled that when a party has been given a full opportunity to be heard in the State court upon all the issues raised in a proceeding, and a decision has been rendered upon principles of general law, in reaching which the Constitution, laws, treaties or controlling rules of the United States are not necessarily involved, then no federal question is raised. It was said by Mr. Justice Gray in *Central Land Co. v. Laidley*, 159 U. S. 103, at page 112: "When the parties

have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. *Walker v. Sauvinet*, 92 U. S. 90; *Head v. Amoskeag Co.* 113 U. S. 9, 26; *Morley v. Lake Shore Railroad*, 146 U. S. 162, 171; *Bergmann v. Backer*, 157 U. S. 655." When a case is presented in the State court for decision upon principles of general law alone, according to which in the ordinary course of the administration of justice rights of parties are determined and issues respecting the life, liberty and property of litigants are adjudicated, then no federal question is involved. *New York Life Ins. Co. v. Hendren*, 92 U. S. 286. *Delmas v. Insurance Co.* 14 Wall. 661, 666. *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335. Where a party seeks in the State court and is there "given opportunity, to litigate the rights claimed by" him, he cannot "complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully." *Remington Paper Co. v. Watson*, 173 U. S. 443, 451. It is possible that these broad statements may be subject to one limitation, namely, that there may be a review by the Supreme Court of the United States where the decision of the State court, although ostensibly rendered on principles of general law and resting thus upon a "non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe v. Thomas*, 207 U. S. 93, 99; *Vandalia Railroad v. South Bend*, [207 U.S.] 359, 367." But even then, if the principle adopted by the State court as one of general law "has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other State decisions of non-federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635; *Eustis v. Bolles*, [150 U. S. 361] 369 . . . *Arkansas Southern Railroad v. German National Bank*, 207 U. S. 270, 275." Mr. Justice Van Devanter, in *Enterprise Irrigation District v. Farmers Mutual Canal Co.* 243 U. S. 157, 164. For the purposes of the present decision, but without passing upon the point, we accept that limitation, although stated in another connection, as applying to the cases at bar.

The cases at bar have been decided, as was the earlier case in

227 Mass. 466 where no attempt was made to raise federal questions, upon what we conceive to be principles of general law. These principles have broad application to all persons connected with contracts and undertakings of any sort which are contrary to express prohibitions of law or otherwise illegal. Notwithstanding the arguments directed to the end of demonstrating the unsoundness of the former decision either in its statement of the governing rules of law or in its application of them to the facts alleged in the bill, we remain content with what there was decided. It stands both upon the doctrine of *stare decisis* and of *res judicata*.

If, however, we are wrong in the view that no federal question is presented, then we are of opinion that the plaintiff has not been deprived of his property without due process of law, and has not been denied the equal protection of the laws. This involves "the consideration of what is due process of law. A precise definition has never been attempted. . . . Its fundamental requirement is an opportunity for a hearing and defence, but no fixed procedure is demanded." *Ballard v. Hunter*, 204 U. S. 241, 255. "The fundamental requisite of due process of law is the opportunity to be heard. *Louisville & Nashville Railroad v. Schmidt*, 177 U. S. 230, 236; *Simon v. Craft*, 182 U. S. 427, 436." *Grannis v. Ordean*, 234 U. S. 385, 394. The words of Mr. Chief Justice Fuller in *Caldwell v. Texas*, 137 U. S. 692, at page 697, are these: "Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. . . . And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." It was said in *Jones v. Buffalo Creek Coal & Coke Co.* 245 U. S. 328, 329, that "error of a trial judge in . . . entering judgment after full hearing does not constitute a denial of due process of law."

The plaintiff in the cases at bar sought the forum of the State court. It is indubitable that he is and was subject to its jurisdiction. He has been heard fully upon every issue which he has raised. The procedure has been according to established practice. Pains-taking consideration has been given to his every argument. The conclusion, so far as it is adverse to his conten-



tions, has been reached by "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer v. Neff*, 95 U. S. 714, 733.

We are unable to discover any foundation for the contention that the plaintiff has been denied the equal protection of the laws. Resort has been had in deciding his cases to rules of law which are familiar. The substance of ancient maxims of the common law, such as *in pari delicto potior est conditio defendentis*, and *ex turpi causa non oritur actio*, and the principles which inevitably flow from them, form the basis of the decision. These principles have been applied to varying phases of human affairs in this Commonwealth for more than a century beginning with *Worcester v. Eaton*, 11 Mass. 368. The decision has been rendered upon principles of general law alone constantly recognized and enforced, not only in this Commonwealth but in many other jurisdictions including the Supreme Court of the United States. *Harriman v. Northern Securities Co.* 197 U. S. 244, 295, 296. *Pullman's Palace Car Co. v. Central Transportation Co.* 171 U. S. 138, 150, 151, and cases there collected: *Dent v. Ferguson*, 132 U. S. 50, 65-68. *McMullen v. Hoffman*, 174 U. S. 639, 654, 655. *Riggs v. Palmer*, 115 N. Y. 506, 511, 512. *Taylor v. Chester*, L. R. 4 Q. B. 309, 313. *White v. Franklin Bank*, 22 Pick. 181. *Huckins v. Hunt*, 138 Mass. 366. *Horton v. Buffinton*, 105 Mass. 399. *West Springfield & Agarwam Street Railway v. Bodurtha*, 181 Mass. 583, 587. *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.* 195 Mass. 356 and cases there collected. *Otis v. Freeman*, 199 Mass. 160. *Rudnick v. Murphy*, 213 Mass. 470, 471.

In its last analysis the plaintiff's contention is that our decision is "so plainly arbitrary and contrary to law as to be an act of mere spoliation." It is needless to amplify further our conclusion that "we fail to perceive the slightest semblance of ground for such a contention." *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335.

The plaintiff also invokes the full faith and credit clause of art. 4, § 1 of the Constitution of the United States and § 237 of the Judicial Code, (U. S. St. 1911, c. 231,) as amended by the act of Congress approved September 6, 1916, (U. S. St. 1916, c. 448,) in support of its contention that it is entitled to share in the

profits of the Stamp Company for the year 1915. We are unable to discern that these provisions are apposite to the issues here depending. See *Stadelman v. Miner*, 246 U. S. 544; and *Ireland v. Woods*, 246 U. S. 323.

In each case let the entry be

*Bill dismissed with costs.*

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PAUL REVERE TRUST COMPANY *vs.* HENRY C. CASTLE.

Suffolk. March 4, 1918. — October 1, 1918.

Present: RUGG, C. J., BRALEY, DE COURECY, CROSBY, & CARROLL, JJ.

*Bills and Notes. Payment. Interest.*

Where the holder of an overdue promissory note, which contains no express provision for the payment of interest, having brought an action thereon against the maker and later another action against the indorsers of the note, makes an agreement in writing with the indorsers that, upon payment by the indorsers on a certain day of the face of the note, he will accept such payment in full satisfaction of all demands and that an entry shall be made in the action against the indorsers of judgment satisfied, and where the indorsers on the day named pay to the plaintiff the amount agreed upon, which is "taken, accepted and received by the plaintiff under and by virtue of said agreement," and the entry of judgment satisfied is made in the action against the indorsers, the maker of the note has a right to the entry of judgment in his favor in the action against him, and no claim of the plaintiff to recover interest from the maker is open.

CONTRACT, the declaration, which originally was in two counts, having been amended by a substituted declaration which was filed at the time of the trial. Writ dated January 8, 1914.

The substituted declaration was as follows:

"And the plaintiff says that it is a holder in due course of a promissory note made by the defendant, a copy of which is hereto annexed marked 'A'; that before maturity the said note was indorsed to the plaintiff, who is now the holder thereof.

"The plaintiff says that said note became due and payable October 12, 1913; and that payment thereof was duly demanded and refused; that on June 1, 1915, the plaintiff was paid the sum of six thousand (6,000) dollars being the principal due on said note,

but that the interest thereon has not been paid either in whole or in part.

"Wherefore, the defendant owes the plaintiff interest on six thousand (6,000) dollars from October 12, 1913, to June 1, 1915, together with interest on such sum from June 1, 1915, to date, and with protest fees."

The copy of the note marked "A" was as follows:

"\$6,000

Boston, June 12, 1913.

Four months after date I promise to pay to the order of Francis W. Lavery. ....

Six Thousand ..... 00/100 Dollars

Payable at Paul Revere Trust Co., Boston, Mass.

Value Received

No.

Due.

Henry Castle,

45 Milk St., Boston.

Protested for non-payment

Oct. 14, 1913 fees \$2.04

Whitford Hunter, Notary Public."

The defendant's amended answer to the substituted declaration is described in the opinion. It concluded as follows:

"And further answering the defendant says that on the seventh day of June, 1915, said date being the first Monday of June, 1915, said defendants, John W. Lavery and Francis W. Lavery, paid to the plaintiff the sum of six thousand (6,000) dollars in accordance with the terms and conditions of their said agreement [mentioned in the opinion] and said sum of six thousand (6,000) dollars was taken, accepted and received by the plaintiff under and by virtue of said agreement, but the plaintiff, in violation of its said agreement, refused to cause an entry of judgment satisfied to be made in the said action of the plaintiff against Francis W. Lavery and John W. Lavery; that said action went to judgment on the first Monday of June, 1915, and has been satisfied by the receipt and acceptance by the plaintiff of said sum of six thousand (6,000) dollars, according to said agreement and that said satisfaction is a bar to the action now pending between the parties hereto."

In the Superior Court the case was heard by *Hitchcock, J.*, without a jury. The bill of exceptions contained the following

statement: "To expedite the trial of said action, it was agreed by the counsel for the parties in open court that for the purposes of this case all the allegations contained in the defendant's amended answer are to be taken as true and to be so considered by the court, and in this agreement the court acquiesced. No other evidence was offered except the promissory note, a copy of which is annexed to the plaintiff's substitute declaration, which note bears the indorsements 'Francis W. Lavery' and 'John W. Lavery & Son' as alleged in the defendant's amended answer."

The judge refused to rule at the request of the defendant that the action could not be maintained, and found for the plaintiff in the sum of \$663.65. The defendant alleged exceptions.

The case was submitted on briefs.

*H. F. R. Dolan, J. H. Morson & J. S. O'Neill*, for the defendant.

*D. Stoneman, A. I. Stoneman & A. G. Gould*, for the plaintiff.

BRALEY, J. It was agreed by the parties in the trial court before which the case was heard without a jury that "all the allegations contained in the defendant's amended answer are to be taken as true and to be so considered by the court, and in this agreement the court acquiesced." By those allegations it appears that the plaintiff, as the holder in due course of a promissory note for \$6,000 dated June 12, 1913, payable four months from date and signed by the defendant as maker, and indorsed by "John W. Lavery & Son," caused the note to be protested at maturity for non-payment. The note remaining unpaid, the plaintiff on January 8, 1914, brought suit against the defendant and on February 18, 1914, began another action against John W. Lavery and Francis W. Lavery as indorsers to recover the face of the note with interest at the rate of six per cent per annum from October 12, 1913. While the actions were pending the plaintiff agreed in writing that, upon payment by the indorsers on or before a certain date of the face of the note, it would accept the amount in full satisfaction of all demands, and that an entry should be made in the second case of judgment satisfied. A verdict by order of the court and agreement of parties was subsequently returned for \$6,510.04, and the case was continued for judgment to June 7, 1915, the date named in the agreement. The indorsers on that day paid to the plaintiff the amount agreed upon which "was taken, accepted and received by the plaintiff under and by virtue

of said agreement." But the plaintiff "refused to cause an entry of judgment satisfied to be made," and prosecuted its action, which is the case at bar, under a "substitute declaration" whereby it sought to recover the unpaid interest from the date of maturity of the note to the date of trial.

It is plain upon these material facts that the presiding judge, instead of finding and ordering judgment for the plaintiff for the amount demanded, should have ruled as requested by the defendant, that the action could not be maintained.

The maker and indorsers by the tenor of the note having been under no contractual obligation therefor, interest was not recoverable except as damages for non-payment of the principal, and, when the plaintiff accepted the principal in full payment, the right to recover the interest either against the indorsers or the maker was extinguished. *Dodge v. Perkins*, 9 Pick. 368, 388. *Whitcomb v. Whitcomb*, 217 Mass. 558, 565. *Davis v. Harrington*, 160 Mass. 278.

It follows that the exceptions must be sustained and judgment should be entered for the defendant.

*So ordered.*

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### WILLIAM C. SCRIBNER'S CASE.

Suffolk. March 6, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Workmen's Compensation Act. Agency, Existence of relation.*

A driver in the general employ of an ice company was let for hire by the ice company with a pair of horses and a wagon to a coal company, by which he was employed to load and deliver coal, brick, wood, lime and cement and sometimes was given a helper in loading and in making deliveries. He took his orders from the office of the coal company and was told by one of the clerks employed there where to deliver his loads. He received his pay from the ice company and was expected by that company to look out for the horses and the wagon in his charge. Otherwise he was wholly under the direction and control of the coal company. When he was loading soft coal into a tip cart in the yard of the coal company he accidentally was hit on the wrist with a shovel by the man who was helping him and was injured. Both the ice company and the coal company were insured under the workmen's compensation act. For the injury above

described the Industrial Accident Board awarded the driver compensation to be paid by the insurer of the ice company. On appeal from a decree affirming this award, it was *held* that the driver at the time of his injury was acting as an employee of the coal company and not as an employee of the ice company, and it was ordered that the decree should be reversed.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board by which they awarded to William C. Scribner compensation to be paid by the Travelers Insurance Company, as the insurer of the Framingham Ice Company, for an injury sustained on January 26, 1917, when the claimant was alleged to have been in the employ of the Framingham Ice Company and was loading soft coal into a tip cart in the yard of the Framingham Coal Company, by reason of accidentally being hit on the right wrist with a shovel by a man who was helping him to load the tip cart.

In the Superior Court the case was heard by *Wait, J.* The evidence in regard to the employment of the claimant is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board ordering the Travelers Insurance Company, as the insurer of the Framingham Ice Company, to pay to the claimant as the employee of that company a total compensation of \$282.86. The insurer appealed.

*L. C. Doyle*, for the insurer.

*E. L. McManus*, for the employee, submitted a brief.

CARROLL, J. The employee, who was in the general employ of the Framingham Ice Company (hereinafter called the ice company), was injured while at work in the yard of the Framingham coal company (hereinafter called the coal company). Both companies were insured under the workmen's compensation act. The Industrial Accident Board awarded compensation against the insurer of the ice company. The only question before us on this appeal is, whether Scribner, at the time of his injury, was an employee of the ice company within the meaning of the workmen's compensation act.

The ice company let to the coal company a pair of horses, wagon and driver. This happened frequently; and on one occasion under this arrangement Scribner worked for the coal company two or three months. He received his wages from the ice company.

The proprietor of the ice company testified that he "looked to Scribner to take care of the horse and team which he owned;" but "exercised no supervision with respect to his delivering coal; Scribner worked there the same as their man did, [and] took his orders from the office of the coal company." The employee testified that Twitchell (one of the clerks employed by the coal company) told him where to deliver the material; that he took his directions from Twitchell; that he helped to load coal, brick, wood, lime or cement; and that sometimes he had a helper when making deliveries.

"In determining whether, in a particular act, he is the servant of his original master or the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result." *Shepard v. Jacobs*, 204 Mass. 110, 112. "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." *Coughlan v. Cambridge*, 166 Mass. 268, 277. Applying these tests, it is clear that Scribner at the time of the injury was an employee of the coal company. He was in that company's yard, engaged in its business and doing its work; and he was under its direction and subject to its orders. Whatever may have been the relation of Scribner to the ice company in the care and management of the horses, at the time of his injury he was engaged in work over which that company had no control. The business was that of the coal company and under its direction. The transaction between the two companies amounted only to a loan of the ice company's servant to the coal company, — the servant became the employee of the latter for the time being, and on the evidence he must be found to have assented to this although remaining in the general employment of the ice company. *Coughlan v. Cambridge*, *supra*. *Hasty v. Sears*, 157 Mass. 123. *Samuelian v. American Tool & Machine Co.* 168 Mass. 12 and cases cited.

*Pigeon's Case*, 216 Mass. 51, relied on by the employee, is distinguishable. In that case the driver was on his way to water the

horse which was owned by Shaw, the general employer, who retained the general direction of the employee except so far as his control was surrendered to the city of Springfield. This relation of control included the care of the horses to the extent, at least, of seeing that they were watered. When injured the employee was under the control of the original master and occupied in his work, and not engaged in the business of the city of Springfield nor under its direction. See, in this connection, *W. S. Quinby Co. v. Estey*, 221 Mass. 56; *Shepard v. Jacobs*, *supra*; *Delory v. Blodgett*, 185 Mass. 126.

In *Clancy's Case*, 228 Mass. 316, the deceased was not in the service of the defendant city nor under its direction when injured; he was the servant of his employer, McGillicuddy, and engaged in his business.

The record shows that the coal company was a subscriber. The employee's remedy under the workmen's compensation act was against the insurer of this company, by whom he was employed, and not against the insurer of the ice company.

This well established principle of the common law, which holds that an employee who is lent to a special employer as distinguished from his general employer, and who assents to the change of employment, becomes the servant of the employer to whom he is lent, applies as well to cases arising under the workmen's compensation act as to those at common law. The English workmen's compensation act, St. 6 Edw. VII, c. 58, § 13, in defining the word "employer" enacts, "where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service . . . the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person." This statute was considered by the commission on compensation for industrial accidents, and in the "Report of the Massachusetts Commission on Compensation for Industrial Accidents" in its "Commentary on the Massachusetts Law" (pages 46, 47, 48, 52, 53) reference is made to the English act and to the English decisions, showing that these were called to the attention of the Legislature. See *McNicol's Case*, 215 Mass. 497, 499. We must assume from the refusal of the Legislature to adopt this particular section of the English statute that it



intended the common law principle should prevail when the services of an employee were transferred from the employment of his general employer to that of a special employer.

To decide, as we are now urged to do, that this rule has no application to proceedings under the workmen's compensation act, would in many cases deprive the injured employee of the benefits which the act was intended to give him, and which can be enforced only by reliance on the common law rule.

In the first section of the workmen's compensation act it is provided that, if the employer is not a subscriber, the injured employee can recover in an action at law by establishing the negligence of the employer. If such an employee, who is lent to an employer and is injured by reason of this employer's negligence, remains the employee of the general employer, it would be difficult if not impossible for him to avail himself of the right given him under this section; for, if injured while engaged in the business of the special employer, under ordinary circumstances it could not be said that the negligence of the general employer caused his injury. His remedy under this section is against the person who is in fact his employer. To abandon the common law rule would make this important section ineffective in many, if not all, of the cases where the employee is injured while temporarily in the employ of a special employer.

Under § 3 of Part II of the workmen's compensation act, if an employee is injured by the serious and wilful misconduct of a subscriber, or of any person regularly entrusted with and exercising the powers of superintendence, he can recover double compensation. The employee's rights under this section are based on the relation of master and servant, and he can recover only from his employer. If we should decide that an employee working for a special employer — notwithstanding his consent to the change — and injured while so employed remained the servant of the general employer, then the employee could not recover the additional compensation provided for in this section unless it could be said that he was injured by the serious and wilful misconduct of the general employer.

In the case at bar, if Scribner was an employee of the ice company and was injured by the serious and wilful misconduct of the coal company, he could not claim the double compensation

against the ice company if he was not injured by reason of that company's misconduct. And, if it were held, he was not an employee of the coal company but was in the employ of the ice company, he could have no relief against the coal company under this particular section, although injured by its serious and wilful misconduct. If the ice company was not a subscriber under the act, and the coal company was such a subscriber and he was injured by its serious and wilful misconduct, to recover the additional compensation under this section it would have to be decided that he was an employee of the coal company. Many other difficulties might be suggested where injustice would be done the employee if the common law principle were abolished.

There might also be obstacles in the way of enforcing the penalty (Part III, § 18) where the employer is required to report all injuries received by employees in the course of their employment, if it were held that an employee working for a special employer and engaged in his business, was not employed by him, but remained the employee of his general employer. In order to safeguard fully the rights of all parties, the well recognized common law rule should prevail in the application of the workmen's compensation act; and the one who is in fact the employer should be held for the consequences of his own neglect.

In *Arnett v. Hayes Wheel Co.* 201 Mich. 67, the facts were these: The Hayes company, a manufacturer, and the Grand Rapids Blowpipe and Dust Arrester Company, a contractor, entered into an agreement whereby the latter was to install a dust collecting system at the plant of the former, furnishing the skilled mechanics therefor, while the Hayes company was to furnish labor to help. A laborer so furnished, working as a helper to a mechanic and under the direction of the contractor but paid by the Hayes company as his general employer, was injured; it was held that the general employer, the Hayes company, was not liable under the workmen's compensation act, but that the special employer, the Grand Rapids company, was liable.

In *Pigeon's Case* and in *Clancy's Case*, *supra*, the common law rule appears to have been assumed. See *King's Case*, 220 Mass. 290; *Comerford's Case*, 224 Mass. 571; S. C. 229 Mass. 573, where this rule was recognized. And, in this connection, see *Humphrey's Case*, 227 Mass. 166, 167. The cases of *Rongo v.*

*R. Waddington & Sons, Inc.* 87 N. J. L. 395, *Matter of Dale v. Saunders Brothers*, 218 N. Y. 59, *Matter of De Noyer v. Cavanaugh*, 221 N. Y. 273, *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, were decided under statutes which differ in material respects from the workmen's compensation act of this Commonwealth. We do not consider them applicable.

It follows that the decree must be reversed and a decree entered in favor of the insurer.

*So ordered.*



### AUGUSTA WARNER vs. CITY OF PITTSFIELD.

Berkshire. September 10, 1918. — October 9, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Damages*, For property taken or impaired by statutory authority. *Way*, Public. *Practice*, Civil, Amendment of docket entry, Agreed statement of facts. *Res Judicata*. *Abatement*. *Judgment*. *Words*, "Notice."

A judge of the Superior Court has power to make an order *nunc pro tunc* to amend past docket entries to accord with the facts.

A statement in an agreed statement of facts presented to this court in a report of a petition for the assessment of damages caused by the repair of a public way by a city, that in a previous proceeding for the assessment of the same damages "a certain notice" which it was necessary that the petitioner should give to the mayor and aldermen "was insufficient," was construed to refer to the omission to file with the mayor and aldermen a "petition for compensation," which by R. L. c. 51, §§ 15, 16, is a necessary preliminary to a petition for the assessment of the damages by a jury.

A plea in abatement to a petition for an assessment of damages caused by the repair of a public way based on the pendency of an earlier petition for the same damages must be overruled, where it appears that in the previous proceedings a verdict was returned for the respondent with leave to the petitioner to present exceptions to this court, that no exceptions ever were filed and that judgment was entered for the respondent, so that the earlier petition was not pending when the second one was brought.

An order of the Superior Court dismissing a petition under R. L. c. 51, §§ 15, 16, for the assessment of damages caused to the petitioner's land by repairs upon a public way on which the land abuts, made on the ground that no petition for compensation had been filed with the mayor and aldermen "after the commencement and within one year after the completion of the work" which caused

the alleged damage, as required by the statute, is not a bar to a new petition for damages to the petitioner's land caused by the same repairs which is filed after a compliance with the requirements of the statute.

PETITION, filed in the Superior Court on August 7, 1917, under R. L. c. 51, §§ 15, 16, by the owner of a parcel of real estate on King Street in Pittsfield for the assessment by a jury of his damages caused by acts done by the respondent for the purpose of repairing King Street.

The respondent filed a plea in abatement as follows:

"And the respondent comes and says that there is now pending a prior suit, petition or proceeding between the same parties for the same cause of action set forth herein, said prior pending action being No. 3804 in this court, or if same has gone to judgment that said judgment was rendered for the respondent upon the same cause of action set forth herein, and that said prior action and the proceedings therein constitute a bar to this action."

By agreement of the parties the case was heard without a jury by *Lawton, J.*, upon an agreed statement of facts, of which the substance is stated in the opinion, and a stipulation of the parties that, if the plea in abatement should be sustained, judgment should be entered for the respondent, and that, if it should be overruled, judgment should be entered for the petitioner in the sum of \$300. The judge overruled the plea in abatement and in accordance with the stipulation found for the petitioner in the sum of \$300 and ordered judgment for that amount. Thereupon by agreement of the parties he reported the case for determination by this court.

The case was submitted on briefs.

*J. Barker*, for the respondent.

*F. M. Myers & T. F. Cassidy*, for the petitioner.

RUGG, C. J. This is an application under R. L. c. 51, § 16, by the owner of land abutting on a public way for the assessment of damages caused by the making of repairs thereon.

The material facts are that an earlier petition for the assessment of damages arising from this same cause was filed in the Superior Court and came on for trial in April, 1917. The judge then ruled that in such a proceeding "a certain notice" must be given to the mayor and aldermen and that the "actual notice which was given in this case was not a proper notice, and therefore this suit

is not properly brought." It was agreed that the "notice . . . was insufficient."

When an owner of land sustains damage by any act done by way of repair upon a way, the first step which he must take in order to have his damages assessed is to file a "petition for compensation with the mayor and aldermen or selectmen or road commissioners, after the commencement and within one year after the completion of the work." R. L. c. 51, § 15. Manifestly it is not accurate to speak of such a "petition for compensation" as a "notice." It is in the nature of a proceeding and requires the board to which it is presented to undertake in the exercise of a *quasi*-judicial function to determine the amount of the damages. No notice is required by the landowner who suffers damages by repairs upon a way. The filing of the "petition for compensation" is the first act to be done by him. Therefore, although the statement in the record is not clear, it seems fairly inferable that the ruling of the judge on the first petition, founded as it appears to have been upon the agreement of the parties as to want of "notice," in substance and effect was the equivalent of a ruling that, no "petition for compensation" having been filed with the mayor and aldermen "after the commencement and within one year after the completion of the work" which caused the damage complained of, as required by the statute, no application for a jury at the bar of the Superior Court for the assessment of damages could be maintained under R. L. c. 51, § 16. So construed the ruling was right and the agreement of parties intelligible; otherwise they have no meaning.

The petitioner on August 7, 1917, filed a new application for the assessment of her damages arising from the same repair of way described in the earlier petition. The respondent seasonably filed a plea in abatement setting out the pendency of the earlier application for the assessment of damages arising from the same cause, and also pleaded in bar the judgment in that proceeding, if it had gone to judgment. It is stated in the record that "After the trial on the first petition and before bringing the second petition, the plaintiff seasonably served sufficient notice on the proper officers of the city." For the reasons already stated we construe this to mean that the petitioner seasonably filed a "petition for compensation with the mayor and aldermen."

The plea in abatement was overruled rightly. Although the judge ruled that the earlier proceeding could not be maintained, the damages were assessed by the jury and then the entry was made on the docket of the following tenor: "Verdict for plttf. for \$300 returned. After return of this verdict and before the recording thereof the trial judge directed that the jury return a verdict for the defendant and reserved leave with the assent of the jury to enter a verdict for the plaintiff in accordance with their finding if upon the exceptions taken on the question of law reserved the Supreme Judicial Court should decide that such verdict for the plaintiff should have been entered. Verdict for the defendant by direction of the court was then ordered and recorded." Apparently no exceptions were filed. This docket entry remained until October 10, 1917, when another judge of the Superior Court directed that entry of judgment for the respondent be made as of June 4, 1917. It does not appear that exceptions were filed within the time limited, or that the time for filing exceptions had been extended. Therefore the case was ripe for judgment and should have gone to judgment on the first Monday of the month immediately succeeding the day on which the time for filing exceptions expired. Rule 57 of the Superior Court (1915). Although doubtless the case then went to judgment automatically under R. L. c. 177, § 1, as amended by St. 1912, c. 190, *Boston Bar Association v. Casey*, 227 Mass. 46, 51, the court had power to order the docket entries to correspond with the facts by a *nunc pro tunc* entry. *Perkins v. Perkins*, 225 Mass. 392. Therefore the earlier proceeding was not pending when the second was brought and its pendency could not be pleaded in abatement thereto. The principles set forth in *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299 and similar cases have no application to these facts.

The judgment in the earlier proceeding did not constitute a bar to the bringing of the present proceeding. That judgment was not rendered upon the merits, but upon a preliminary matter. The filing of a "petition for compensation with the mayor and aldermen" and a grievance respecting the same either by an inadequate estimate of damages or a neglect and refusal for thirty days to make any estimate, were conditions precedent to the existence of a right in the petitioner to file an application under

R. L. c. 51, § 16, for a jury to assess damages in the Superior Court. The Superior Court, therefore, was without authority to consider the first case, unless the point was waived. But the record shows that it was insisted on and became the ground of the judgment. The present cause of action had not sprung into existence at the time the earlier application for a jury was filed. Although the two relate in general to the same transaction, the present proceeding is founded upon considerations different from those which formed the basis of the judgment in the other case. The earlier judgment not having been grounded upon a determination of the merits of the controversy, but upon the circumstance that it was prematurely brought, is no bar to the present proceeding. *Foster v. The Richard Busteed*, 100 Mass. 409. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 46. *Cinamon v. St. Louis Rubber Co.* 229 Mass. 33, 37.

Cases like *Spear v. Coggan*, 223 Mass. 156, to the effect that a defendant ought not to be twice vexed for the same cause of action, have no relevancy to the facts here disclosed.

In accordance with the terms of the report, let the entry be  
*Judgment for the petitioner in the sum of \$300.*

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### EDSON KNIGHT'S (dependent's) CASE.

Berkshire. September 10, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

#### *Workmen's Compensation Act. Proximate Cause.*

In a claim under the workmen's compensation act, a finding of the Industrial Accident Board, that the death of an employee of a coal dealer from the bursting of his aortic artery was not caused by a fall on the ice when he was delivering coal more than three months before, is a finding of fact, and where, as in the present case, there was evidence warranting the finding, it is not subject to revision by this court.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board making the finding which is quoted in

the opinion and dismissing the claim of Ida Knight as the dependent widow of Edson Knight.

The case was heard by *Lawton, J.*, who made a decree that the claim for compensation be dismissed. The dependent widow appealed.

The case was submitted on briefs.

*S. G. Tenney*, for the dependent widow.

*H. A. Moran*, for the insurer.

DE COURCY, J. The deceased, Edson Knight, was a laborer in the employ of H. P. Cole, a coal dealer in Williamstown. While at work on April 20, 1917, he was taken ill, was removed to his home and died the same day. An autopsy disclosed aneurism, or localized dilatation, of the large blood vessel leading from the heart (the aortic artery), and a rupture of the same, which resulted in his death. The dependent's case was based upon the contention that the aneurism was caused or aggravated by an injury which Knight sustained on January 15, 1917, while he was delivering coal at the house of a customer of his said employer. The finding of the Industrial Accident Board was as follows: "The evidence shows and the board find and decide that the claimant has failed to sustain the burden of proving that decedent's demise had any causal connection with a personal injury which arose out of and in the course of his employment; that it is unlikely that the condition of aneurism of the aorta which caused the employee's death was due to or materially aggravated by the fall on the ice of January 15."

It is forcibly argued by the claimant that on the reported evidence she has established a causal connection between the accident of January 15 and the death of Knight, more than three months later. That issue is one of fact, and is to be determined by the Industrial Accident Board. See St. 1911, c. 751, Part III, § 16, as amended by St. 1912, c. 571, § 15. Their decision is not subject to revision by this court. As in the analogous case of the verdict of a jury or the finding by a judge in an action at law, their finding is conclusive if it has a substantial support in the evidence. *Pigeon's Case*, 216 Mass. 51. *Uzzio's Case*, 228 Mass. 331.

There was evidence from which it could be found that the artery was in a somewhat soft condition, and with spots indicating



degeneration, and that the aneurism was due to disease of the tissues rather than to the accident. The certificate of the medical examiner reported as a contributory cause of death "softening or degeneration of walls of artery." A physician who was present at the autopsy testified that it was impossible to state whether there was a causal connection between the accident and the death. It further appeared that after the accident in January, which happened on Saturday, Knight worked on the following Monday, Tuesday and Wednesday, and that he did his regular work from February 16 until the day of his death, April 20. On this evidence we cannot say as matter of law that the finding of the board was unwarranted. Accordingly the decree of the Superior Court dismissing the claim for compensation must be affirmed, and it is

*So ordered.*

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### CHARLES HOLMBERG'S (dependent's) CASE.

Berkshire. September 10, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

#### *Workmen's Compensation Act, Dependency.*

Under St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3, a child under eighteen years of age by a former husband of the widow of a deceased employee, who was a member of the employee's family at the time of his death, not being one of his next of kin, cannot receive compensation as a dependent.

Under St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3, a child under eighteen years of age of a deceased employee by a former wife, having therefore no surviving parent, who was not living with the deceased employee at the time of his death, is conclusively presumed to have been wholly dependent upon his father for support; and, where there are also a surviving widow and a child of her and the deceased employee, who were living with the employee at the time of his death, the compensation under the workmen's compensation act is to be awarded in equal shares to the widow and the two mentioned children of the employee, the third part due to the child of the widow to be paid to the widow, and the third part due to the child by the former wife to be paid to his guardian.

APPEAL to the Superior Court under St. 1911, c. 751, Part II, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Matilda

Holmberg as the dependent widow of Charles Holmberg, a deceased employee, and to Neilson Holmberg and Ernest Holmberg, sons of the deceased employee under eighteen years of age.

In the Superior Court the case was heard by *Hitchcock*, J. The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the board ordering "that the total dependency compensation of \$10 a week for four hundred weeks be divided equally between the three claimants, and that the insurer pay the sum of \$3.33 $\frac{1}{3}$  each week to each of the following claimants, namely, Matilda Holmberg, widow, Neilson Holmberg, a son, and Ernest Holmberg, a son of the deceased employee, Charles Holmberg, the amount due to Neilson Holmberg to be paid to Matilda Holmberg for the benefit of said Neilson Holmberg, and the sum due Ernest Holmberg to be paid to his guardian or legal representative for his benefit." Matilda Holmberg appealed.

*P. J. Moore*, for the dependent widow.

*R. M. Stevens*, for Ernest Holmberg.

CROSBY, J. This is a proceeding under the workmen's compensation act. Charles Holmberg, the employee, received personal injuries arising out of and in the course of his employment which resulted in his death. He left a widow, Matilda, and their child, Neilson Holmberg. Mrs. Holmberg's daughter Alice, a child of a former marriage, lived with the employee and her mother at the time of his decease. The employee also left a son Ernest Holmberg, a child by a former wife, who lived with the decedent's daughter in Wisconsin. All the above named children are under the age of eighteen years. The question at issue is, Who are entitled as dependents to share in the payments due on account of the death of the employee?

It is the contention of the widow that she is entitled as sole dependent to the total compensation due under the act. As the widow was living with her husband at the time of his death, she is conclusively presumed to be wholly dependent upon him for support: St. 1911, c. 751, Part II, § 7 (a).

The widow's daughter Alice, although a member of the employee's family at the time of his decease, not being his child, is not entitled to compensation under St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3; nor is she entitled to com-

pensation under the last paragraph of § 7, because, as was said in *Coakley's Case*, 216 Mass. 71, at page 73, "'all other cases,' and 'such other cases,' . . . must mean cases other than those specifically provided for in paragraphs (a), (b) and (c) of the section." *McNicol's Case*, 215 Mass. 497.

The son Ernest Holmberg, a child by a former wife, and under the age of eighteen years, is conclusively presumed to be wholly dependent for support upon the deceased employee under paragraph (c) of § 7, because as to him there is no surviving parent. The fact that Ernest was not living with his father at the time of the decease of the latter does not affect the presumption. There is nothing in the statute correctly construed which provides that the child of a former marriage shall be living with the employee at the time of his (the employee's) death to be entitled to compensation.

Under the workmen's compensation act as originally enacted (St. 1911, c. 751, Part II, § 7) it was held in *Coakley's Case*, *supra*, that if the employee was survived by a wife who was living with him at the time of his death and by children of such wife, and also by a child of a former wife who was under the age of eighteen years and who was living with him at the time of his death, such child by a former wife, having no surviving dependent parent, was conclusively presumed to be wholly dependent, as was the widow, and entitled to share equally with her the compensation payable under the act.

It followed that, under § 7 as originally enacted, the children of the deceased who were also children of the widow were not conclusively presumed to be dependent because as to them there was a surviving parent; but, after the decision in *Coakley's Case*, apparently to remedy this inequality between children of the employee and the widow and children of a former marriage and for the purpose of permitting all children of the deceased to share equally in the payments of compensation under the act, § 7 was amended by St. 1914, c. 708, § 3, which provides in part as follows: "(c) A child or children under the age of eighteen years, . . . upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent: provided, that in the event of the death of an employee who has at the time of his death a living child or children

by a former wife or husband, under the age of eighteen years, . . . said child or children shall be conclusively presumed to be wholly dependent for support upon such deceased employee, and the death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child. The total sum due the surviving wife or husband and her or his own children shall be paid directly to the wife or husband for her or his own use and for the benefit of her or his own children, and the sums due to the children by the former wife or husband of the deceased employee shall be paid to their guardians or legal representatives for the benefit of such children."

It is plain that under the statute above quoted and in force at the time of the death of the employee, the total compensation found to be due by the Industrial Accident Board was correctly determined by it, and is to be apportioned equally between the widow and each of the surviving children of the deceased employee, — the compensation due to Neilson Holmberg to be paid to the widow, and the sum due to Ernest Holmberg to be paid to his guardian.

The decree is to be modified by providing that the amount due Ernest Holmberg shall be paid to his guardian; and as so modified it is affirmed.

*So ordered.*

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MARY E. HOWLAND vs. INHABITANTS OF GREENFIELD.

Franklin. September 17, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Sewer. Waiver. Estoppel. Damages.* For property taken or impaired under statutory authority.

A claim of a landowner against a town for damages for the taking of an easement in his land for the construction of a sewer is a chose in action which does not pass by a deed of the land.

Where an easement in land for the construction of a sewer is taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, and where the landowner had actual notice of the vote of the selectmen to construct the sewer, which was passed at his

request, and subsequently appeared before the selectmen and said to them that he "was very anxious for the sewer" and "would claim no damages," and where his land was benefited by the sewer and he and his heirs for seventeen years after the construction of the sewer never questioned the regularity of the proceedings under which it was constructed, there has been a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, and his successor in title cannot maintain a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance.

BILL IN EQUITY, filed in the Superior Court on December 14, 1914, by the owner of certain real estate on Pierce Street in Greenfield against the town of Greenfield, praying, first, for a mandatory injunction ordering the defendant to remove from the plaintiff's land all pipes and conduits used by the defendant for the purposes of a sewer, and, second, for an order to the defendant to pay damages to the plaintiff for unlawfully maintaining a sewer in the plaintiff's land.

The case was referred to a master, who filed a report containing the findings that are stated in the opinion. The plaintiff filed exceptions to the report. The case was heard by *Quinn, J.*, who made an order overruling the plaintiff's exceptions. He ruled, first, that the plaintiff was precluded from maintaining her bill because of the waiver of damages by Franklin A. Pond, her predecessor in title, and, second, that in the light of all the circumstances the plaintiff was guilty of laches. Later by order of the judge a final decree was entered dismissing the bill with costs to the defendant. The plaintiff appealed.

*H. E. Ward*, (*H. E. Adams* with him,) for the plaintiff.

*H. A. Weymoth*, for the defendant.

BRALEY, J. It is settled that where an easement in private land is taken for the maintenance of a sewer, only the person who at the date of taking owns the land or some interest therein has any claim to damages. And, independently of any question of waiver or estoppel, whatever right to damages in any form the owner of the land may have had, whether the entry of the defendant thereon was lawful or unlawful, was a chose in action which did not pass to her under the deed. *Webster v. Lowell*, 139 Mass. 172. *Briggs v. Treasurer & Receiver General*, 224 Mass. 46, 47.

But, while conceding that the first prayer of the bill for damages must fail, the plaintiff contends that under the second prayer she

is entitled to a mandatory injunction, because, the original location having been void, the subsequent maintenance of the sewer constitutes a continuing trespass. It appears from the record that Franklin A. Pond, who was the owner, desired the town to construct a branch sewer through a portion of his land for the purpose of securing more effective drainage, and that the town voted to construct the sewer. The selectmen proceeded to carry out the vote, and, where land was taken for a sewer, they were required by the statutes then in force to give written notice to the landowner or leave the same at his last and usual place of abode, seven days at least before taking action, of their intention to locate and maintain the sewer as well as of the time and place of their meeting, and also to file in the town clerk's office the layout with the boundaries and measurements seven days at least before the meeting when action was to be taken by the town on their report. Pub. Sts. c. 50, §§ 1, 2; c. 49, §§ 67, 71. The notice, however, although sufficient in form and delivered in hand, was not served until the day before the appointed time, and, while the town at a meeting duly warned and under an appropriate article in the warrant voted to build the sewer as laid out by the selectmen, it does not appear that the layout was ever filed. It is argued by the counsel for the plaintiff that the failure to comply with these requirements is fatal, and the construction of the sewer was unlawful. *Poor v. Blake*, 123 Mass. 543.

In our opinion these omissions are insufficient under the circumstances shown by the record to support the bill. While compliance with these provisions is necessary or the right of the public to take private property for a sewer cannot be exercised lawfully, and, if the landowner, being dissatisfied with the award of the selectmen, had asked for a jury to assess damages, he could not have maintained the petition (*Jeffries v. Swampscott*, 105 Mass. 535, *Blaisdell v. Winthrop*, 118 Mass. 138), the master reports that the landowner had actual notice, and that he subsequently appeared before the selectmen where he said that he "was very anxious for the sewer," and "would claim no damages." If this positive and deliberate action is coupled with the further facts that his estate was benefited by the sewer, which was built at his request, and that he must have known what portion of the land had been taken, and

that during the succeeding seventeen years of ownership by himself and his heirs the regularity of the proceedings has never been questioned, enough appears to show a waiver of the errors, or that he and his heirs were estopped from taking advantage of them. *Fuller v. County Commissioners*, 15 Pick. 81. *Seymour v. Carter*, 2 Met. 520. *Pickford v. Mayor & Aldermen of Lynn*, 98 Mass. 491. *Noyes v. City Council of Springfield*, 116 Mass. 87. *Collins v. Mayor & Aldermen of Holyoke*, 146 Mass. 298. *Driscoll v. Taunton*, 160 Mass. 486, 494.

If it be suggested that, in the absence of a layout duly filed the voters in town meeting do not "know exactly what the proposition is upon which they are to decide," the landowner could not avail himself of this error for his own advantage on the ground that in building and maintaining the sewer the town, which had acted in good faith, committed a trespass entitling him to injunctive relief and to damages. *Preston v. West's Beach Corp.* 195 Mass. 482, 493. *Watertown v. County Commissioners*, 176 Mass. 22, 32, 33, 34. The transaction from its inception having been in substance an agreement on his part, that, if the town would construct and maintain a sewer, he would give the necessary location and make no claim for damages, the cases of *Fitchburg Railroad v. Fitchburg*, 121 Mass. 132, *Grace v. Newton Board of Health*, 135 Mass. 490, and *Wood v. Milton*, 197 Mass. 531, are plainly distinguishable.

The plaintiff not having acquired any greater estate than that possessed by her predecessor in title after the sewer had been built, took the premises subject to the public easement. *Pickford v. Mayor & Aldermen of Lynn*, 98 Mass. 491. *Livingstone v. Taunton*, 155 Mass. 363. *Hendrie v. Boston*, 179 Mass. 59.

It becomes unnecessary to consider the question of laches also relied on by the defendant, and the decree dismissing the bill should be affirmed with costs.

*So ordered.*

MARGARET BECHTOLD, administratrix, vs. JOSEPH F. RAE  
& another.

Franklin. September 17, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, In maintaining elevator, Of one controlling real estate. Elevator.*

In an action by an administrator against the proprietor of a hotel for causing the death of the plaintiff's intestate by negligence in the maintenance and operation of an elevator in which a night watchman of the defendant had started to take the intestate to his room as a guest at the hotel, there was evidence on which it could have been found that a rear door of the elevator was open at the time the elevator was started and remained open up to the time of the accident and that the failure to close this door contributed to the happening of the accident and was negligence on the part of the defendant. There also was evidence that the defendant had violated certain regulations made by the board of elevator regulations under St. 1913, c. 806, that the license of the defendant's night watchman to operate an elevator had expired and that it had not been renewed at the time of the accident and that the elevator was not equipped, as required by the regulations, with an interlocking device that would prevent the operation of the elevator unless the door was closed. It could have been found that these violations of the regulations, which constituted a penal offence, contributed to the happening of the accident. *Held*, that, due care on the part of the plaintiff's intestate being presumed under St. 1914, c. 553, the case properly was submitted to the jury.

In the case above described it was *said* that it was not necessary to consider, whether without the presumption created by the statute there would have been evidence of due care of the plaintiff's intestate.

TORT by the administratrix of the estate of Jacob Bechtold, late of Greenfield, against the defendants, conducting as partners a hotel in Boston called the Crawford House and maintaining therein an elevator used for conveying guests to various parts of the hotel, for negligently causing the death of the plaintiff's intestate on September 12, 1916; with a count, afterwards added by amendment, claiming damages for conscious suffering of the intestate. Writ dated January 19, 1917.

In the Superior Court the case was tried before *Hamilton, J.* The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendants made a motion that a verdict be ordered for the defendants. The



judge denied the motion. The defendants then asked the judge to make the following rulings:

"1. There is no sufficient evidence of conscious suffering to warrant a finding of any damages on that count.

"2. In no event can there be a recovery of damages for a period of more than one second.

"3. There is no evidence of any negligence on the part of the elevator [night watchman] Webster which was a proximate cause of the accident, and the fact that Webster did not have a license at the time of the accident was not a proximate cause of the accident."

The judge refused to make any of these rulings and submitted the case to the jury. The jury returned a verdict for the plaintiff on the first count, for causing death, in the sum of \$5,000. On the second count, for conscious suffering, the jury found for the defendants. The defendants alleged exceptions, which, after the death of *Hamilton, J.*, were allowed by *Wait, J.*

*C. S. Knowles*, for the defendants.

*C. Fairhurst*, (*W. A. Davenport* with him,) for the plaintiff.

CROSBY, J. This is an action brought against the defendants, who conducted the Crawford House, a hotel in Boston, for the conscious suffering and death of the plaintiff's intestate, while he was a guest and was being carried in an elevator from the office floor to the floor on which he had been assigned a room.

His death was caused by being caught between the floor of the elevator and the upper casing of a door leading into the elevator well. The front of the elevator, where the door opening into the office was located, was sixty inches wide and fifty-two inches deep; directly opposite the door above referred to there was another door, at the back of the elevator. This rear door was used to reach floors in the rear of the hotel which were not on the same level with the floors to which access was had through the front door. The floor next above the office, called the parlor floor, was twenty-two inches above the office floor, and was reached by means of the elevator through its rear door. The elevator, a power passenger car, was operated by means of a lever located at the left side of the car, as it was entered, between the front and rear doors; the lever being about eighteen inches from the front door and about thirty-four inches from the rear door.

The accident occurred about half past two o'clock on the morning of September 12, 1916. The elevator was in charge of one Webster, a night watchman in the employ of the defendants. He testified that he passed the deceased and got the key to the room at the office and when he returned the deceased, who was a large man, had just entered the elevator and stood "between the lever and the door at the back, filling that part of the elevator." He further testified in substance that, when he started the elevator with his hand on the lever, he was facing the office and the deceased was behind him; that when the car had gone up a short distance he turned and saw the legs and feet and so much of the body of the deceased as was below the middle of the abdomen, in the car; that the upper portion of the body was caught between the floor of the elevator and the top of the door which opened into the parlor floor.

It is the contention of the plaintiff that when the elevator was started the rear door was open; if so, it was evidence of negligence.

The only evidence upon this question came from Webster who testified that, from the time he went on duty up to the time the plaintiff's intestate entered the elevator, the rear door had not been opened; but he also testified that just before taking the deceased up he did not know whether the rear door was open or not; and that he "did not look to see whether the rear door was open or closed when [he] . . . got on the elevator." In view of these conflicting statements, and the evidence as to the position of the body of the deceased when the elevator came to a stop, it could have been found that the rear door was open at the time the car was started and remained open up to the time of the accident. The jury could have found that the failure to close this door contributed to the happening of the accident, and that such failure was negligence on the part of the defendants. *Hayes v. Pitts-Kimball Co.* 183 Mass. 262. *Munsey v. Webb*, 231 U. S. 150.

Although there was nothing to show the exact way in which the accident occurred, still the defendants might be found to be negligent if the jury were satisfied upon the evidence that the injury was due to their neglect. *Heuser v. Tileston & Hollingsworth Co.* 230 Mass. 299. *Davis v. Boston Elevated Railway*, 222 Mass. 475. *McNicholas v. New England Telephone & Telegraph Co.* 196

Mass. 138, 141. *Woodall v. Boston Elevated Railway*, 192 Mass. 308. *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196.

Under St. 1913, c. 806, a board described as the "Board of Elevator Regulations" was created by the Legislature, with authority to frame regulations relating to the construction, installation and operation of all elevators then installed or thereafter to be installed. This board duly framed such regulations, and they were in force at the time of the accident. Certain of these regulations were admitted properly in evidence, and had the force of law. There was evidence to show that the regulations so admitted were violated by the defendants.

The evidence was undisputed that while Webster was duly licensed to operate the elevator from May 22, 1915, for one year, that no license for that purpose was afterward issued to him until September 14, 1916. It thus appears that at the time of the accident he operated the elevator in violation of law. It also appeared that the elevator was not equipped with any interlocking device which would prevent the operation of the car unless the door was closed.

The operation of the elevator in violation of the foregoing regulations was a penal offence and could have been found to have contributed to the happening of the accident. Accordingly it was evidence of negligence on the part of the defendants. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580. *Baldwin v. American Writing Paper Co.* 196 Mass. 402, 409. *Doolan v. Pocasset Manuf. Co.* 200 Mass. 200.

It could not have been ruled that the deceased was not in the exercise of due care, as that question properly was submitted to the jury under St. 1914, c. 553. We need not consider whether the evidence was sufficient to warrant a finding in favor of the plaintiff independently of the statute.

As the jury found for the defendants under the count for conscious suffering, the defendants' first and second requests have become immaterial; the third could not properly have been given. The exceptions argued, for the reasons above stated, cannot be sustained; those not argued are treated as waived.

*Exceptions overruled.*

**HATTIE M. HUNT, executrix, vs. ECONOMIC MACHINERY COMPANY.**

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Of one controlling real estate, Shafting.*

If a coal dealer goes with one of his teams to deliver coal ordered by a machinery company, and, while he is standing on his wagon engaged in shovelling coal into a coal pit, his clothing is caught by a rapidly revolving shaft with projecting nuts, which is only four and a half feet above the floor of the wagon where he is standing, and he receives injuries which cause his death, his executrix cannot maintain an action against the machinery company for causing his death, there having been no duty on the part of that company to warn him of the perfectly obvious danger of contact with the revolving shaft.

TORT by the executrix of the will of George E. Hunt, a coal dealer in Worcester, for causing the death and conscious suffering of the plaintiff's testator on December 24, 1915, when the testator had gone with one of his teams to supervise the delivery of some coal ordered by the defendant, a corporation engaged in manufacturing machinery. Writ dated January 12, 1916.

In the Superior Court the case was tried before *Morton, J.* The evidence is described in the opinion. At the close of the evidence the judge upon the defendant's motion ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

*C. W. Wood & C. H. Wood*, for the plaintiff.

*C. C. Milton, D. F. Gay & F. L. Riley*, for the defendant.

BRALEY, J. The plaintiff on the principal question of the defendant's negligence maintains that under *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216, the case should have been submitted to the jury. The rule formulated in *Carleton v. Franconia Iron & Steel Co.*, which has since been followed in numerous cases, is that the "owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the

land . . . which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

But, even if the jury would have been warranted in finding that the testator was upon the premises delivering coal by the defendant's invitation, the shaft revolving at high speed which caught his clothing in such a manner as to hold him firmly while it revolved until the machinery was stopped and he was released after suffering injuries, causing his death the same day, was plainly visible. Its position across the passageway was four and one half feet above the floor of the wagon where he was standing engaged in shovelling coal into the pit, and the uncontroverted evidence introduced by the plaintiff shows that the shaft with the projecting nuts was in full view not only from the floor of the passage way but from the floor of the wagon. The testator could perform the work in his own way and there is no evidence that at any time his attention was distracted, and the danger of contact with the shaft if proper precautions were not taken was obvious. It is manifest under these circumstances that no warning by the defendant would have disclosed a different situation or environment from that which was within his vision.

The plaintiff having failed to show the violation of any legal duty owed to her testator by the company, the exceptions must be overruled. *Silvia v. Sagamore Manuf. Co.* 177 Mass. 476. *Hoyt v. Woodbury*, 200 Mass. 343.

So ordered.

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MARY A. CLARK vs. FRANK J. YOUNG & another.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Equity Jurisdiction*, To cancel instrument. *Payment*: Mortgage, Of real estate.  
*Equity Pleading and Practice*, Master's report.

In a suit in equity by a married woman seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, a master found that the debt secured by the mortgage was paid in full by the mortgagee to the plaintiff's husband acting as her agent and that the money so received

was applied by the plaintiff's husband in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question, and it was *held* that the mortgage debt having been paid in full to the plaintiff's authorized agent and the plaintiff having received the benefit of that payment, the defendant mortgagor was entitled to receive from the plaintiff a valid discharge of the mortgage, and that the bill must be dismissed.

In the same suit the plaintiff contended that renewals of her notes to the trust company, which were paid with the money received from the defendant, were made in her name by her husband without her authority, and it was *held* that whether these renewals were unauthorized or not was immaterial, because, if they were unauthorized, they did not operate as payment of the plaintiff's original valid notes to the trust company and left those notes in force until they were paid by the plaintiff's husband with the money received from the defendant in payment of the mortgage debt.

Findings of fact contained in a master's report, which does not report the evidence on which they were based, are not subject to review.

A motion to recommit a master's report is addressed to the discretion of the trial judge.

**BILL IN EQUITY**, filed in the Superior Court on August 10, 1916, by Mary A. Clark, the wife of Byron Clark, against Frank J. Young and William R. Williams, containing the allegations described in the opinion and praying for an accounting between the plaintiff and the defendant Young as to the amount due to the plaintiff from that defendant, also praying for a decree that the instrument purporting to be a discharge of a mortgage signed by the plaintiff be cancelled, that the plaintiff's mortgage be declared to be prior in time and right to the mortgages held by the defendant Williams and that the defendant Williams be enjoined from foreclosing or attempting to foreclose either of the mortgages held by him.

The case was referred to a master, who made a report containing the findings which are described in his opinion. The plaintiff filed exceptions to the master's report and also filed a motion that the report be recommitted to the master with certain instructions.

The exceptions and the motion were heard by *Wait, J.*, who denied the motion to recommit the master's report and made an order overruling the plaintiff's exceptions and confirming the master's report. Later by order of the judge a final decree was entered ordering that the plaintiff's bill be dismissed, and ordering, in accordance with a stipulation of the parties, "that, if the decrees overruling the plaintiff's exceptions, confirming

the master's report and dismissing the plaintiff's bill be finally affirmed, the plaintiff shall thereupon execute and deliver to the defendant Young, or to his attorney of record, a discharge of the mortgage given by the defendant Frank J. Young to the plaintiff, Mary A. Clark, dated February 1, 1909." The plaintiff appealed.

*M. M. Taylor*, for the plaintiff. Captain *M. C. Taylor*, who assisted in the preparation of the brief, was absent on military service in France.

*E. J. McMahon & C. S. Dodge*, for the defendants.

DE COURCY, J. These facts are established by the master's report: Byron Clark of Oxford, the husband of the plaintiff, arranged with his wife for a loan to the defendant Young. The note and mortgage on his farm, given by Young to the plaintiff and dated February 1, 1909, were for \$1,000, but in fact only \$800 was received and due thereon.

The plaintiff assigned this mortgage to the Worcester Trust Company on December 20, 1910, as security for a note of \$800 made by her and her husband, due April 20, 1911. The trust company continued to hold the mortgage to secure this note and its renewals until June 23, 1913. At that time, in accordance with an arrangement made by the defendants Young and Williams, and Byron Clark ("who was acting for the plaintiff and had full authority in the premises"), Williams furnished enough money to obtain a release of the Clark mortgage from the trust company and the further sum of \$200 to pay a creditor of Young, and Young gave him a note therefor, secured by a mortgage on his farm. The check for \$832.76, (the amount due on the mortgage note from Young to the plaintiff,) was given to Byron Clark and by him was indorsed to the trust company. The mortgage was reassigned by the trust company to the plaintiff, and Byron Clark gave to Young what purported to be a discharge of it by the plaintiff, together with the mortgage and mortgage note. The assignment, the instrument purporting to be a discharge, and the new mortgage to Williams were recorded together on June 23, 1913.

The master finds that the instrument purporting to be a discharge of the plaintiff's mortgage was not signed by her, but that a facsimile of her signature was affixed thereto by her husband, Byron Clark, by means of a stamp, without her knowledge or

authority. He further finds that neither Young nor Williams knew that this signature was a forgery, that both acted in entire good faith, and that Williams furnished full consideration for the note and mortgages given to him.

The plaintiff has brought this bill in equity to have the discharge cancelled and her mortgage declared prior in right to those given to the defendant Williams. Plainly she was not entitled to such relief from a court of equity in view of the following findings of the master: "I find that \$832.76 included all that was due from Young on said mortgage, that the payment by said Williams of said sum was a payment to said Worcester Trust Company through said Byron Clark and that it discharged a valid obligation from the plaintiff to said trust company; that it was the intention of said Young, said Clark as agent of plaintiff, and Williams that said payment to said trust company should operate to cancel the debt secured by the mortgage from Young to the plaintiff and I find that it did so operate, and that nothing is now due to the plaintiff on said mortgage." On the facts so found the \$832.76 not only was paid to the fully authorized agent of the plaintiff, but she received the benefit of it as completely as if it had been handed to her personally. It follows that the defendant Young, whose debt to the plaintiff has been fully paid, is entitled to a valid discharge of the mortgage securing that debt, — as provided for in the stipulation referred to in the final decree of the Superior Court.

It appears from the master's report that on April 20, 1911, when the plaintiff's \$800 note to the Worcester Trust Company became due, there also matured another note for \$1,200, made to the trust company by her and her husband. These were taken up by a note for \$2,000, which was renewed from time to time. Later \$1,000 was paid, and a new note for \$1,000 was given. The trust company continued to hold the Young mortgage as security. The plaintiff contended that her signature on the \$800 note and that on the \$1,200 note were genuine, but that it was forged on all subsequent notes given in renewal thereof or substitution therefor. The master found that there was no evidence of negligence or bad faith on the part of the trust company, and he ruled and found that the claim of that company would not be extinguished by the giving of a forged note. The



plaintiff's exception thereto must be overruled. If the renewal notes were forged they did not operate as payment of the original valid notes. The plaintiff was indebted to the trust company in the same amount whether the renewal notes were forged or genuine. *Walker v. Mayo*, 143 Mass. 42. *Central National Bank v. Copp*, 184 Mass. 328. *Bass v. Wellesley*, 192 Mass. 526.

What we have said disposes of all the plaintiff's exceptions to the master's report except those taken to findings of fact. We cannot review these findings, as the evidence on which they were based is not before us. *Cook v. Scheffreen*, 215 Mass. 444.

The motion to recommit the master's report was addressed to the discretion of the judge. *Thompson v. Davis*, 225 Mass. 385. We may add that the interlocutory order referring to the reports of the master in other cases was irregular, and has been disregarded. We have considered this case only on the facts and law disclosed by its own record.

*Decree affirmed with costs.*

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NAPOLEON J. GAGNON *vs.* WORCESTER CONSOLIDATED  
STREET RAILWAY COMPANY.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Street railway, Motor vehicle. Motor Vehicle.*

In an action against a street railway corporation for personal injuries caused by a collision between an electric street railway car of the defendant and a motor car driven by the plaintiff, there was evidence that the plaintiff had backed his car from a garage on a city street across the sidewalk and into the street and was in the act of turning his car to go forward on the street when it was struck by the street railway car of the defendant, going in the same direction in which the plaintiff was about to go, and was forced diagonally across the sidewalk, that the plaintiff was obliged to back out of the garage and to go as far as the defendant's track before turning, that the accident happened at a "rush hour" when street railway cars were passing or approaching the garage [in "almost a continuous chain," that the nearest rail of the defendant's tracks was only twelve feet away from the curb line of the sidewalk, that when the plaintiff was on the sidewalk he looked and saw the defendant's car more than four hundred and forty feet away, that when he reached the gutter he looked again and saw the defendant's car about four hundred feet distant and knew that

he "had plenty of time," but that, when he had stopped looking and was about to go forward, the defendant's car came upon him at great and unusual speed and without warning. There was ample evidence of the negligence of the defendant's motorman. *Held*, that under St. 1914, c. 553, it could not be ruled as matter of law that the defendant had proved that the plaintiff was negligent. In the same case it was *said* that, although it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, yet he well might rely to some extent on the expectation that the motorman would act with due regard to the safety of others lawfully using the street.

TORT for personal injuries sustained by the plaintiff on November 28, 1916, on Main Street in Worcester by reason of a collision between an electric street railway car of the defendant and a motor car which the plaintiff was driving as a licensed chauffeur. Writ dated April 25, 1917.

In the Superior Court the case was tried before *Sisk, J.* The evidence is described in the opinion. At the close of the evidence the defendant made a motion that the judge should order a verdict for it. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$750. The defendant alleged exceptions.

*C. C. Milton*, for the defendant.

*J. Clark, Jr.*, for the plaintiff.

DE COURCY, J. The plaintiff was injured in a collision between an automobile which he was driving and an electric car of the defendant; and a verdict has been rendered in his favor. The only exception taken at the trial is one to the refusal of the presiding judge to direct a verdict for the defendant.

The accident happened on Main Street in Worcester, where there were double street railway tracks. The plaintiff had backed his automobile from a garage on the easterly line of Main Street across the sidewalk and into the street, and was in the act of turning the machine to go forward in a northerly direction when a north bound car of the defendant struck the automobile and drove it diagonally across the sidewalk.

There was ample evidence of the motorman's negligence, — and we do not understand that the defendant argues to the contrary. The jury could find that the motorman should have seen the sign warning him to "go slow — 4 miles an hour," yet he ran his car down grade at a speed of twenty or twenty-five miles an hour until just before the collision; and that, although the plaintiff

was within view continuously after the car reached Jackson Street, four hundred feet from the place of the accident, the motor-man was talking with others, and did not observe the automobile until it was too late to prevent a collision. *Sughrue v. Bay State Street Railway*, 230 Mass. 363.

The issue of the plaintiff's due care was rightly submitted to the jury. In the first place, the St. 1914, c. 553, made contributory negligence on the part of the plaintiff "an affirmative defence to be set up in the answer of, and proved by the defendant." It could not be ruled as matter of law that the defendant had sustained that burden on the oral and conflicting testimony. *Duggan v. Bay State Street Railway*, 230 Mass. 370. Further, the jury could find these facts: the plaintiff was obliged to back out of the garage, and to go as far as the north bound track before turning; at this "rush hour" electric cars were passing or approaching the garage in "almost a continuous chain," and the nearest rail was only twelve feet from the curb line; when the plaintiff was on the sidewalk he looked and saw this car beyond Jackson Street, or more than four hundred and forty feet away; he looked again when he reached the gutter and saw the car near Jackson Street, or about four hundred feet distant; he knew that he "had plenty of time," but when he had come to a stop and was about to go forward, the car came upon him at an unusual and rapid speed, and without warning. While it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, he well might trust something to the expectation that the motor-man also would act with due regard for the safety of others lawfully using the street.

*Exceptions overruled.*

MARY L. ANGER, executrix, vs. WORCESTER CONSOLIDATED  
STREET RAILWAY COMPANY.

SAME vs. SAME.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Street railway. Evidence, Materiality.*

Running an electric street railway car after dark upon a track on a country road, "sparsely settled," at the rate of from twenty to twenty-five miles an hour and having a searchlight at the head of the car, not different from or more powerful than those in common use after dark upon street cars in such places, is not evidence of negligence in the operation of the car.

In an action by an executor against a street railway corporation for causing the death of the plaintiff's testator by running into him with a car which he knew was approaching, when he was running ahead of it in order to board it at a station where he knew it would stop, evidence that the motorman failed to ring a bell or sound a whistle to give notice of the car's approach is immaterial, because a failure to give such a signal could not have misled the testator, who knew of the car's approach, and consequently such failure could not have caused his injury and death.

In the same case it was *held* that evidence, that, if the bell had been rung or the whistle had been sounded, the testator would have heard it, properly was excluded as immaterial.

In the same case it was *held* that the motorman's failure to anticipate that the testator would run so near the track as to be hit by the car or would attempt to cross the track at a place where it would be impossible to avoid an accident was no evidence of negligence.

In the same case it was *said*, that, as there was no evidence to warrant a finding that the defendant was negligent, it was not necessary to consider whether under St. 1914, c. 553, it was shown as matter of law that the negligence of the intestate contributed to his injury and death.

TWO ACTIONS OF TORT by the executrix of the will of John B. Anger, late of Worcester, the first for causing the death of the plaintiff's testator, and the second for causing his conscious suffering, by running into him with a street railway car of the defendant at about eighteen minutes past six o'clock in the afternoon of September 24, 1916, near Prospect Park in the town of Auburn in the county of Worcester. Writ dated November 2, 1916.

In the Superior Court the cases were tried together before

*Bell, J.* The evidence is described in the opinion. At the close of the evidence the judge on motion of the defendant ordered a verdict for the defendant in each of the cases. The plaintiff alleged exceptions.

*F. B. Spellman*, for the plaintiff.

*C. C. Milton*, for the defendant.

CROSBY, J. The first action is brought to recover for the death of the plaintiff's testator, John B. Anger; the second, is to recover for his conscious suffering.

The deceased was struck by an electric car operated by the defendant on the evening of September 24, 1916, near Prospect Park in the town of Auburn. The record shows that the deceased and four others, two of whom were his sons, left a house in Auburn to board a trolley car at the Prospect Park station to go to Worcester; that, with one of his sons and one Cote, he walked along Bryn Mawr Avenue until they came to a point about eight hundred feet from the place of the accident, when they heard an electric car coming behind them; they could not see it, but heard the buzzing and saw electric sparks on the trolley wire; that they then started to run toward the Prospect Park station for the purpose of boarding the car at that place, — the son of the deceased running ahead of his father and Cote; that the latter, after running some distance, stopped, and the car went past him; and that the deceased continued to run until he reached a point about at the intersection of Bryn Mawr Avenue and Park Street when he was struck by the car and received injuries which soon afterwards resulted in his death. There was evidence that the car was running at a rate of from twenty to twenty-five miles an hour, that no signal was given, and that there was a powerful searchlight on the car. From this evidence, it is the contention of the plaintiff that the jury could have found the testator's injuries and death were due to the negligence of the defendant.

The record shows that it was a dark night and that Bryn Mawr Avenue was "a country road and sparsely settled." There is no evidence to show that at that time and place, under the circumstances, the speed of the car was unusual or improper.

The searchlight upon the car does not appear to have been different or more powerful than is in common use at night upon street cars in such places, and its use at the time and place of the

accident could not properly have been found to be negligent. *Spotea v. Berkshire Street Railway*, 212 Mass. 599.

Upon the facts disclosed, the jury would not have been warranted in finding that the motorman was negligent if he failed to ring the bell or to sound the whistle, as his failure to do so could not have been found to have misled the deceased and his companions as to the approach of the car. They knew of its coming and for that reason were running ahead of it in order to board it at the station where they knew it would stop for passengers. *Altavilla v. Old Colony Street Railway*, 222 Mass. 322, 326. *Selibede v. Worcester Consolidated Street Railway*, 223 Mass. 76, 79. *O'Donnell v. Bay State Street Railway*, 226 Mass. 418, 420.

It is plain there is no evidence to show that the motorman was negligent; he was not bound to assume that the deceased would either run so near the track or would attempt to cross it at a place where it would be impossible to avoid an accident. *Ducharme v. Holyoke Street Railway*, 203 Mass. 384. *Brightman v. Union Street Railway*, 216 Mass. 152. *Osborne v. Bay State Street Railway*, 222 Mass. 427. *Welsh v. Concord, Maynard & Hudson Street Railway*, 223 Mass. 184. *O'Donnell v. Bay State Street Railway*, *supra*. *Connors v. Worcester Consolidated Street Railway*, 228 Mass. 357.

The exception to the exclusion of the evidence of the witness as to whether, if the bell had been rung or the whistle sounded, he would have heard it, must be overruled. As the deceased knew of the approach of the car, the evidence was immaterial. *Welsh v. Concord, Maynard & Hudson Street Railway*, *supra*.

As there was no evidence to justify a finding that the defendant was negligent, we need not consider whether it has shown as matter of law that negligence of the deceased contributed to his injuries. St. 1914, c. 553.

The result is that in each case the entry must be

*Exceptions overruled.*

ERNEST N. DAIGNEAU vs. WORCESTER CONSOLIDATED  
STREET RAILWAY COMPANY.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Street railway. Evidence, Matters of common knowledge.*

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, running on a track laid over a private way not in a city, passed a white post, which was not a stopping place for that car, at a rate of speed of from twenty to thirty miles an hour.

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, when not being operated in a city, carried a powerful headlight, whose rays had a tendency to dazzle and temporarily blind a person watching its approach, it being a matter of common knowledge that such headlights are in general use under similar circumstances upon electric street railway cars at night.

A person, who stood near a white post watching and waiting for an approaching electric street railway car which he thought was to stop there and raised his hand to signal to the motorman to stop, and who was struck and injured by the running board of the car as it passed him, in an action against the street railway corporation for his injuries cannot contend that the defendant's motorman was negligent in failing to sound a gong or blow a whistle to give notice of the car's approach, because he did not need such notice and the failure to give it could not have caused the accident.

A motorman operating a street railway car at night, who sees a man standing in line with a white post, at which that car is not to stop, which is about five feet from the track, reasonably may believe that the man is not in danger of being struck by the running board of the car as it passes him.

TORT for personal injuries sustained on the evening of July 19, 1916, by reason of being struck by an electric street railway car of the defendant when the plaintiff was standing near a white post a few yards from the car barn at Lake Quinsigamond waiting for the car to stop. Writ dated September 16, 1916.

In the Superior Court the case was tried before *Morton, J.*, who at the close of the evidence, which is described in the opinion, ordered a verdict for the defendant and by agreement of the parties reported the case for determination by this court with a stipulation that, if the ordering of the verdict was right, judgment should be entered for the defendant on the verdict; other-

wise, judgment was to be entered for the plaintiff in the sum of \$600.

The case was submitted on briefs.

*J. H. Reid & J. H. Mathews*, for the plaintiff.

*C. C. Milton, J. M. Thayer & F. H. Dewey*, for the defendant.

CROSBY, J. This is an action brought to recover for personal injuries received by the plaintiff, who was struck by an electric car of the defendant. At the close of the evidence, the presiding judge ordered a verdict for the defendant and reported the case to this court. All the evidence material to the issues involved is embodied in the report.

The plaintiff testified that he had spent the evening with his friend, one Boland, at the Lakeside Boat Club at Lake Quinsigamond in Worcester, and about 11:45 o'clock in the evening they started to take a car back to the city; that in order to reach a white post at the westerly side of the south bound track where they expected to board the car, they crossed the double tracks and the plaintiff stopped about five or six feet northerly of the white post "and stood almost in a line with it." He further testified that "it was dark; we saw a car coming from Lincoln Park and waited approximately half a minute and the car was coming toward us; I raised my hand to signal the car to stop; the flash from the headlight shone right in our eyes so I could n't really see until it came right down on me; the light was glaring in my face and had an absolutely blinding effect on me; I estimated that the car was about half way between the white post and the barn when something struck me; the car was going fifteen or twenty miles an hour at the time I was struck; no gong was sounded or whistle was blown; after I was struck the car stopped at the electric light pole about one hundred and twenty-five feet distant southerly; no whistle was sounded; it was my intention to take this car; I signalled the motorman to stop; it was a Boston and Worcester car; but I did not know it until after I was struck; an open car; I was struck by the running board which injured the shin bones of both my legs; there were two or three steps or running boards on the car instead of one."

The motorman who operated the car at the time of the accident testified that there was no arc light on the car at that time, but that it was equipped with the "regulation headlight." He also



testified that he saw the plaintiff and Boland cross the track when he was "about ten or fifteen car lengths from the white post the other side of the car barn, a distance between three and five hundred feet."

It is agreed that the defendant's tracks at the place of the accident were on private land, although the defendant does not claim that the plaintiff was a trespasser.

The plaintiff contends that the jury would have been warranted in finding the defendant was negligent because of the speed of the car, because the light from the headlight was so strong as to have a blinding effect upon him, because no signal of the approach of the car was given, and finally, because the motorman made no effort to stop the car.

While there was evidence to show that the car was running at a rate of speed of from twenty to thirty miles an hour, it was so running upon a private way, express to Worcester: it was not scheduled to stop at the white post where the plaintiff stood. Under the circumstances, it could not rightly have been found that the rate of speed was excessive or improper. *Anger v. Worcester Consolidated Street Railway*, ante, 163. *O'Donnell v. Bay State Street Railway*, 226 Mass. 418.

It was not evidence of negligence if the car carried a powerful headlight whose rays had a tendency to blind the sight of the plaintiff as it approached the point where he was standing. It is a matter of common knowledge that such headlights are in general use under similar circumstances upon electric street cars at night. *Spoate v. Berkshire Street Railway*, 212 Mass. 599. *Hansen v. Fitchburg & Leominster Street Railway*, 222 Mass. 116.

Nor was the failure to ring the bell or to sound the gong or to give some other signal of the approach of the car evidence of negligence of the motorman. Such signal could not have afforded the plaintiff any knowledge which he did not possess; he testified that he saw the car coming and waited approximately half a minute as it came toward him. *Altavilla v. Old Colony Street Railway*, 222 Mass. 322, 326. *Selibede v. Worcester Consolidated Street Railway*, 223 Mass. 76. *O'Donnell v. Bay State Street Railway*, supra.

There was no failure of duty on the part of the motorman because he made no effort to stop the car, although he had seen the

plaintiff and his companion standing near the white post; it does not appear that he saw the plaintiff or Boland after they crossed the tracks and stood at the post waiting, except when he was on the other side of the car barn from three hundred to five hundred feet north of the white post, and there is nothing to show that he ought reasonably to have anticipated that the plaintiff would stand so near to the track that he would come in contact with the running board on the side of the car. If, as the plaintiff testified, he was standing about in line with the white post and five or six feet northerly of it, the motorman might reasonably believe that he was not in a place of danger. The plan which was put in evidence by the parties shows that the white post is about five feet from the track, and there is no contention that there was not sufficient space for the car to pass without striking it. It follows that if, as the plaintiff testified, he stood about in line with the post, the accident could not have occurred.

The jury would not have been warranted in finding that the defendant was negligent. The case cannot be distinguished in principle from *Connors v. Worcester Consolidated Street Railway*, 228 Mass. 357, *O'Donnell v. Bay State Street Railway*, *supra*, *Selibedea v. Worcester Consolidated Street Railway*, *supra*, *Osborne v. Bay State Street Railway*, 222 Mass. 427, *Brightman v. Union Street Railway*, 216 Mass. 152.

It is unnecessary to consider whether the defendant has affirmatively established as matter of law that the negligence of the plaintiff contributed to his injury. St. 1914, c. 553.

In accordance with the terms of the report, the entry must be  
*Judgment for the defendant on the verdict.*

JOSEPH LABUFF vs. WORCESTER CONSOLIDATED STREET  
RAILWAY COMPANY.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Nuisance. Negligence, Street railway, Unlawful obstruction of highway. Way, Public. Workmen's Compensation Act. Election.*

In an action by a teamster against a street railway corporation for personal injuries from being thrown from a wagon when the horse he was driving shied at the canvas cover of a rail grinding machine of the defendant that had been left standing on one of its tracks in a public highway, there was evidence that the machine was heavy and cumbersome and had been used in grinding joints of the defendant's rails in another street and then, instead of being placed in the defendant's storage house, which was easily accessible, had been moved to this street and left there from Saturday until Monday and that the accident happened on Sunday, that an ordinance of the city in which the accident occurred provided that no person should place any obstruction of any kind in any highway or street "without a written license from the street commissioner" and that the defendant had obtained no such license. *Held*, that the question, whether the machine made the street dangerous to travellers, was for the jury, and that, if the jury found that the machine constituted an obstruction in the highway, the defendant's failure to procure a license was evidence of its negligence, and that the question of the defendant's liability was for the jury.

By St. 1911, c. 751, Part III, § 15, as amended by St. 1913, c. 448, if an employee whose employer is a subscriber under the workmen's compensation act sustains an injury in the course of and arising out of his employment "under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both." An employee having received such an injury under the circumstances described in the statute, who was not shown to have been ignorant of his rights or to have lacked knowledge of all material facts, brought an action of tort against a street railway corporation to recover damages for his injury and afterwards gave notice to the insurer of his employer that he claimed compensation for his injury under the workmen's compensation act. *Held*, that the bringing of the action at law by the employee before he gave notice to the insurer of any claim for compensation was an election by which both the employee and the defendant in the action at law were bound, and that the plaintiff's right to recovery was not barred by his subsequent notice under the workmen's compensation act.

In the case above described it was *said* that, the plaintiff's election of remedy having been complete before his notice to the insurer of his employer, it was not necessary to consider whether a subsequent notice of withdrawal to the insurer operated as a waiver of the claim to compensation.

TORT for personal injuries sustained by a teamster on January 9, 1916, by being thrown from a wagon in which he was driving when the horse shied at the canvas cover of a machine for grinding tracks and smoothing the joints of rails which the defendant was alleged negligently to have placed and to have allowed to remain on one of its tracks on Southbridge Street, a public highway in Worcester. Writ dated February 2, 1916.

In the Superior Court the case was tried before *Morton, J.* The evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for the defendant. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$3,000. The defendant alleged exceptions.

*C. C. Milton*, for the defendant.

*J. Clark, Jr.*, for the plaintiff.

**BRALEY, J.** While conceding that the plaintiff has been injured and raising no question as to his due care, the defendant's first contention is, that there is no evidence that the accident was caused by its negligence. The jury however would be warranted in finding that the horse driven by the plaintiff, although ordinarily gentle and well broken, becoming frightened by the sudden flapping of the canvas cover on a grinding machine owned by the defendant and left on its railway track located in the public way, over which the plaintiff as a traveller was passing, "bolted or shied," throwing him out of the carriage against a pole, causing serious injuries. It is settled that in common with other travellers the plaintiff had the right to a free and unobstructed use of the street in so far as it had been wrought for travel, subject only to the lawful right of the defendant to maintain its track and to operate its cars. *Hennessey v. Taylor*, 189 Mass. 583. *O'Brien v. Blue Hill Street Railway*, 186 Mass. 446, 449. The machine which was heavy and cumbrous had been used in grinding joints in another street the day before the accident, which occurred on Sunday. But instead of being placed in the defendant's storage house, which the jury could say was easily accessible, it had been transported on a "crane car" and left in the position previously described where it remained until used on the following Monday. It is unnecessary to decide whether the machine would have been an unjustifiable obstruction if it had been in operation, for the

city ordinance then in force required that, "No person shall in any highway or street place any obstruction of any kind without a written license from the street commissioner," which license the defendant admits had not been obtained. The question, whether under the circumstances the machine rendered the street dangerous to travellers, was for the jury, and, if they found that it constituted an obstruction, the defendant's failure to procure a license could be properly considered in passing upon its negligence. *Leahy v. Standard Oil Co. of New York*, 224 Mass. 352, 364. *Hurley v. Boston & Maine Railroad*, 228 Mass. 365, 367. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580, 582. The question of the defendant's liability was properly submitted to the jury.

The plaintiff, when injured, having been a teamster in the employ of a corporation which had become a subscriber under St. 1911, c. 751, and amendatory acts, and having given notice to the insurer of a claim for compensation, the remaining contention is, that he cannot maintain the present action. By St. 1911, c. 751, Part III, § 15, as amended by St. 1913, c. 448, "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person, and in case the association recovers a sum greater than that paid by the association to the employee four fifths of the excess shall be paid over to the employee." If for the purposes of our decision it is assumed that the plaintiff's injuries arose out of and in the course of his employment, he could not concurrently proceed at common law for damages and under the statute for compensation. *Barry v. Bay State Street Railway*, 222 Mass. 366, 371. *Hall v. Henry Thayer & Co.* 225 Mass. 151. And where compensation is accepted the insurer at once is subrogated to the employee's cause of action. *Turnquist v. Hannon*, 219 Mass. 560. The plaintiff, who is not shown to have been ignorant of his rights or to have lacked knowl-

edge of all material facts, had at his command the choice of remedies or of remedial rights which were inconsistent and not analogous. *Snow v. Alley*, 156 Mass. 193. *Cripps's Case*, 216 Mass. 586, 589. *Turnquist v. Hannon*, *supra*. It was for him to decide whether he would bring suit, or rely on the statute. The action at law, having been begun and pending before he gave notice to the insurer of any claim for compensation, is therefore under these circumstances an election by which he as well as the defendant is bound. *Frisch v. Wells*, 200 Mass. 429, 431. *Cripps's Case*, 216 Mass. 586. *Turnquist v. Hannon*, *supra*. *Hall v. Henry Thayer & Co.* *supra*. St. 1911, c. 751, Part III, § 15. St. 1913, c. 448.

The right of recovery not having been barred, it becomes unnecessary to consider whether the payment by the plaintiff's employer of his wages during the first week of disability was made under the statute, or was a gratuity because of his unfortunate condition, or whether his subsequent notice of withdrawal to the insurer operated as a waiver of the claim to compensation.

*Exceptions overruled.*

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OLAUS BERGGREN & another, administrators, *vs.* MUTUAL LIFE  
INSURANCE COMPANY OF NEW YORK.

SAME *vs.* SAME.

SAME *vs.* TRAVELERS INSURANCE COMPANY.

Worcester. September 30, 1918. — October 10, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

*Practice, Civil*, New trial. *Witness*, Credibility.

At the trial of an action on a policy of life insurance the principal question before the jury was whether the insured, who died as the result of taking cyanide of potassium, came to his death by accident or by suicide. The jury found in answer to questions that the insured came to his death by accident, and a verdict was ordered for the plaintiff. The defendant moved for a new trial on the ground of newly discovered evidence. At the hearing of this motion it appeared that after the trial an agent of the defendant, who before the trial had spent about a month in trying to ascertain the facts, was

sent again to the neighborhood where the insured lived with instructions to reinvestigate the case to see whether there might be any evidence previously missed and whether persons talked more freely after the trial, that a man in this neighborhood, who before the trial had stated that he knew nothing about the case, made an affidavit tending to show an intimate acquaintance of the affiant with the insured and giving in minute detail conversations with him a comparatively short time before his death, in which the insured expressed a purpose to commit suicide and gave the reasons actuating him, one of them being business adversity, and in which he talked also of taking poison. Counter affidavits were filed tending to discredit some or all of the statements of this affiant. The agent of the defendant who made the investigation testified orally at the hearing of the motion for a new trial. The judge who had presided at the trial heard the motion and made an order granting a new trial. In granting it he said, "There was some question in my mind whether the verdict of the jury was fairly warranted by the evidence. The inference of accident was a forced one, and, without saying that it was not legally warranted, the question was at least so close that slight evidence might well have changed the result. In the exercise of what in my opinion is sound judicial discretion, in view of my knowledge of the evidence at the trial, I must grant the motion." The judge reported his order for a new trial for determination by this court. *Held*, that there had been no abuse of discretion by the trial judge in granting the motion for a new trial and that the case should stand for trial.

In the case above described it was *said* that, even if the newly discovered evidence were cumulative, that alone would not be decisive against granting the motion for a new trial.

In the same case it was *held* that, although it was shown that the affiant previously had made assertions inconsistent with some of those contained in his affidavit, this was not conclusive against his credibility as a witness.

In the same case it appeared that one witness at least had been called at the trial who knew or might have known that the facts disclosed in the affidavit were within the knowledge of the affiant, and it was *held* that, although this was a matter to be considered, it was not a controlling reason for denying the motion for a new trial.

In the same case it was *held* that the circumstance, that the affiant and his knowledge of material facts were discovered by an agent of the defendant who had searched for evidence before the trial, although a matter to be considered, was not conclusive against granting the motion for a new trial, especially as this agent testified orally before the judge at the hearing of the motion for a new trial and the judge thus was better able than any one else to decide whether the agent was honest and trustworthy.

In the same case it was *held* that it was proper for the judge to take into account the strength or weakness of the plaintiff's case at the trial in passing upon the defendant's motion for a new trial.

THREE ACTIONS OF CONTRACT by the administrators of the estate of Karl W. Leaf, late of Quincy, each on a policy insuring the life of the plaintiff's intestate. Writs dated April 30, 1917.

In the Superior Court the cases were tried together before *Morton, J.* At the close of the evidence the judge submitted to

the jury in the two cases against the Mutual Life Insurance Company of New York the question, "Did the deceased, Karl Leaf, commit suicide?" The jury answered, "No." In the case against the Travelers Insurance Company the judge submitted to the jury the question, "Was the deceased Karl W. Leaf's death due to accident?" The jury answered, "Yes." Thereupon the judge ordered verdicts for the plaintiffs, in the first case in the sum of \$3,358.56, in the second case in the sum of \$2,238.16 and in the third case in the sum of \$8,396.28. Thereafter each of the defendants filed a motion for a new trial on the ground of newly discovered evidence. The motions were heard by *Morton, J.* The evidence presented at the hearing is described in the opinion. At the close of the hearing the plaintiffs in each of the cases asked the judge to make the following rulings:

"1. Upon the motion in each case, the affidavits in support thereof, the counter-affidavits and the oral testimony received at the hearing, the motion as filed in each case should be denied.

"2. Upon the motion in each case, all the supporting affidavits, the counter-affidavits and the oral testimony received at the hearing, the motion in each case, upon the exercise of a sound judicial discretion of the court, should be denied."

The judge refused to make either of these rulings. He made an order in each case granting the motion for a new trial, and filed a statement of findings and rulings, containing those that are described in the opinion. The plaintiffs excepted to the judge's rulings and refusals to rule and to the orders granting a new trial and asked that the cases be reported to this court. The judge, being of opinion that his rulings and orders ought to be determined by this court before any further proceedings in the Superior Court, reported the cases for such determination.

*M. M. Taylor*, for the plaintiffs. Captain *M. C. Taylor*, who assisted in the preparation of the brief, was absent on military service in France.

*C. C. Milton*, for the defendant Travelers Insurance Company.

*R. Foster & G. Hoague*, for the defendant Mutual Life Insurance Company of New York, submitted a brief.

*Rugg, C. J.* This record relates to the granting of motions for a new trial on the ground of newly discovered evidence. The actions are to recover upon policies of insurance on the life of



Karl W. Leaf. He died as the result of taking cyanide of potassium, which was contained in the neck of a bottle of medicine imported from England and bought for him in some drug store. There was no claim or evidence that he had been murdered. The chief question at the trial before the jury was whether the insured came to his death by accident, as contended by the plaintiffs, or by suicide, as contended by the defendants. The trial lasted several days and many witnesses testified. The jury in answers to questions found in favor of the contentions of the plaintiffs and verdicts were ordered accordingly.

After the trial an agent of the defendants, who previously had spent about a month in trying to ascertain the facts, was sent again to the neighborhood where the insured lived with instructions to reinvestigate the cases to see if there might be any evidence previously missed and if people had talked more freely after the trial. The result was that one Olson, who before the trial had stated that he knew nothing about the case, made an affidavit tending to show an intimate acquaintance with the insured and in minute detail conversations with him within a comparatively short time before his death, wherein the insured expressed a purpose to commit suicide and the reasons actuating him, one being business adversity. There was talk also as to taking poison. Counter affidavits were filed tending to discredit some or all of the statements in the affidavit of Olson. This agent of the defendants testified orally in court on the motion for a new trial.

The principles governing the review by this court of the action of the trial judge in granting or denying a motion for a new trial, whether on the ground of newly discovered evidence or for other reasons, are well settled. Except where questions of law are raised for the first time on the motion for a new trial, *Loveland v. Rand*, 200 Mass. 142, *Boyd v. Boston Elevated Railway*, 224 Mass. 199, 202, *Ramsay v. LeBow*, 220 Mass. 227, 229, *Matter of Carver*, 224 Mass. 169, 171, the right of the judge to set aside a verdict on any ground recognized by law in the ordinary case is limited only by sound judicial discretion and is not subject to revision by this court. It is only in an extraordinary case revealing an abuse of judicial power, or an excess of jurisdiction or similar error, that the action of the trial court upon a motion for a new trial can be reversed. *Edwards v. Willey*, 218 Mass. 363, 365,

and cases there collected. *Centennial Electric Co. v. Morse*, 227 Mass. 486, 490. *Harrington v. Boston Elevated Railway*, 229 Mass. 421, 433. *Herrick v. Waitt*, 224 Mass. 415, 418. *Damm v. Boylston*, 218 Mass. 557. *People v. Shilitano*, 218 N. Y. 161, 180.

Doubtless new trials are not to be granted on the ground of newly discovered evidence except upon proof of important evidence of such a nature as to be likely to have a material effect upon the result, which could not reasonably have been discovered before the trial by the exercise of proper diligence and respecting the production of which on motion there has been an entire want of laches. A new trial ordinarily will not be granted upon the discovery of evidence which is cumulative and in most such cases will and ought to be denied. *Sawyer v. Merrill*, 10 Pick. 16, 18. *Gardner v. Mitchell*, 6 Pick. 114, 116. *People v. Superior Court of New York*, 10 Wend. 285. *Gardner v. Gardner*, 2 Gray, 434, 443. *Plymouth v. Russell Mills*, 7 Allen, 438, 443. *McLaughlin v. Doane*, 56 Maine, 289. See *Keet v. Mason*, 167 Mass. 154. The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close "their eyes to injustice on account of facility of abuse." Nevertheless, most critical scrutiny must be given to the kind of evidence offered in support of the motion, to the sources from which it comes, and the circumstances under which it is produced.

The findings of fact made on the motion for a new trial show that the judge had a full appreciation of these principles and of the gravity of setting aside a verdict after a full trial unless the interests of justice plainly demanded it. His statement, to the effect that he had examined carefully the affidavits as well as the oral testimony and had gone at length into the merits of the motion because, to use his words, "I realized the danger of encouraging litigation by reopening cases, so thoroughly prepared and

tried as this case was, upon the testimony of one witness who has contradicted himself," is supported amply by the record.

At the trial, out of the forty witnesses called, "only one — possibly two — testified to statements by Leaf of intention to take poison or commit suicide." It is manifest from the affidavit that the testimony of Olson would not have regard to the same statements by the deceased as to which testimony was offered at the trial. It is plain that the probative value of the evidence set forth in the affidavit of Olson, if presented at a trial and believed, is great. The conditions under which the statements by the insured are said to have been made, together with the accompanying reasons and particularity of circumstances, have a tendency to show that testimony of Olson, although directed to the proof of the same ultimate conclusion, would relate to new and distinct facts different from those shown at the trial. *Parker v. Hardy*, 24 Pick. 246, 248. Even if the evidence were cumulative, that alone would not be decisive against it as ground for granting a new trial in the exercise of sound judicial discretion provided other necessary elements were present. *Keet v. Mason*, 167 Mass. 154.

Although Olson previously had made assertions inconsistent with some of those contained in his affidavit, that is not conclusive against his credibility as a witness. It would be for the jury to say what weight should be given to his testimony. It cannot be said that the conclusion of the judge, to the effect, after hearing the oral testimony of those who had seen the affiant, that he was not so unworthy of belief as to require the denial of the motion, was wrong. Moreover, the judge had seen the witnesses, whose testimony was in conflict with the statement of the affiant, and thus had some basis for determining what its weight might be in the face of contrary testimony. There are not such inherent inconsistencies, improbabilities and contradictions in the affidavit as to discredit it.

The judge analyzed carefully the facts touching the efforts made by the defendants to obtain this evidence before the trial. His conclusion, in substance that they were guilty of no neglect but on the contrary were diligent and used reasonable sagacity, is supported by direct testimony and the rational inferences to be drawn therefrom.

Although one witness at least was called who knew or may have

known that the facts now disclosed were within the knowledge of Olson, that factor although of some significance is not controlling against granting the motions.

The circumstance, that the affiant and his knowledge of material evidence were discovered by the agent of the defendant who had searched for evidence before the trial, although calling for close examination is not fatal to the motions. This witness testified before the judge, who was better able than any one else to decide whether he was honest and reliable.

The judge presided at the trial, saw all the witnesses, observed their manner of testifying, and was in a position superior to that of any one else to determine with accuracy the strength of the plaintiffs' case. Upon this point he said: "There was some question in my mind whether the verdict of the jury was fairly warranted by the evidence. The inference of accident was a forced one, and without saying that it was not legally warranted, the question was at least so close that slight evidence might well have changed the result. In the exercise of what in my opinion is sound judicial discretion, in view of my knowledge of the nature of the evidence at the trial, I must grant the motion, in each of the three cases."

It was entirely proper for him to take into account the strength or weakness of the plaintiffs' case at the trial in passing upon the motions. Indubitably a denial of the motions in the case at bar could not have been pronounced erroneous in law. Of course all the elements present on this record do not require as matter of law the granting of a new trial. All that need be said is that they afford adequate foundation for the exercise of judicial discretion to that end, provided in the opinion of the presiding judge it was wise in order to accomplish justice. *Watts v. Howard*, 7 Met. 478.

All the cases cited in behalf of the plaintiffs have been examined, but they do not affect this decision and need not be reviewed.

A careful investigation of the record and full consideration of the arguments urged in behalf of the plaintiffs leads to the result that there has been no abuse of discretion by the trial judge in granting the motions for new trial, and that the cases fall within the general rule. Let the entry in each case be

*Case to stand for trial.*

## FRANK E. McINTOSH vs. FRANK P. ABBOT.

Worcester. October 1, 1918. — October 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; CARROLL, JJ.

*Agency, Duty of respect to employer.*

Although an employee rightly may be discharged for disrespectful words or conduct, his employer has not an absolute right to discharge him for disrespect and rudeness arising from an innocent misunderstanding of facts and not amounting to insubordination.

CONTRACT for the alleged breach of an agreement to employ for one year the plaintiff as a farm hand and his wife in the house on the defendant's farm. Writ in the Second District Court of Eastern Worcester dated May 3, 1916.

The declaration was as follows: "And the plaintiff says that on April 1, 1915, he entered into an oral agreement with the defendant by which the plaintiff was to do general farm work for the defendant for a term of one year and was to provide the services of his wife in general work about the defendant's house in so far as such services were needed; and in consideration thereof the defendant was to pay the plaintiff sixty (60) dollars per month and was to furnish the plaintiff with board and lodging for himself, his wife and two children for the term of one year from April 1, 1915, which said board and lodging was worth sixty dollars additional per month; that on or about August 1, 1915, the defendant without right discharged the plaintiff and caused himself, his wife and children to remove from the defendant's premises, thereby breaking his agreement with the plaintiff; that thereby the plaintiff has been damaged in the sum claimed in his writ."

On appeal to the Superior Court the case was tried before *Sanderson, J.*, without a jury. The evidence and the findings of the judge are described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings and findings:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover."

"5. On all the evidence in the case the plaintiff has failed to prove that he was wrongfully discharged by the defendant.

"6. Even if the court should find a contract of employment for a definite period of time, in order to recover, the plaintiff must show that at all times during his employment he acted in a respectful and proper manner towards the defendant.

"7. On all the evidence it appears that on or about July 26, 1915, the plaintiff used disrespectful and insulting language to the defendant."

"13. On all the evidence the defendant is entitled to a finding and ruling in his favor."

The judge refused to make any of these rulings or findings. The defendant also asked the judge to make the following ruling:

"9. Even if the court should find a contract of employment for a definite period of time, if the plaintiff while a servant or employee of the defendant indulged in either disrespectful or insulting language or both toward the defendant, the defendant was justified in discharging the plaintiff."

The judge refused to make this ruling as to disrespectful language but made the ruling as requested as to insulting language.

The judge made the findings that are described in the opinion and found for the plaintiff in the sum of \$508.35. The defendant alleged exceptions.

*P. A. Atherton*, for the defendant.

*G. E. O'Toole*, for the plaintiff.

RUGG, C. J. This is an action to recover damages for breach of an agreement by the defendant to employ the plaintiff to work on a farm for one year at stipulated wages for himself and wife, and to furnish the plaintiff with rooms and board for himself, his wife and two children, all living in the house with the defendant and his sister. The plaintiff was discharged under these circumstances: Somewhat late on a July night the defendant came into the house with his sister and guests and made considerable unnecessary noise in closing doors and otherwise, whereby the sleep of the plaintiff and his wife was disturbed. Similar noises had been made late on other nights by the defendant, although without intention and without a purpose to annoy or disturb the plaintiff. Thereupon the plaintiff called from the second floor to the defendant in a loud and angry voice, "Mr. Frank, I wish

you would not slam doors so much. If you people want us to get out of here, come and tell us straight. You have been slamming doors for two weeks." The sister and guests of the defendant heard the scolding voice but not the words spoken. The defendant replied, "You could be more polite about it." The next day the defendant said to the plaintiff, "I expect that apology from you for the way you bellowed at me last night. If you do not apologize, you will hear from me to-morrow." Later in the day the plaintiff came upon the piazza and said to the defendant, who was sitting there with his brother and sister, "You speak your piece first. I can't apologize; I can't get down on my knees to any man." The defendant thereupon discharged the plaintiff. After stating the finding of these facts, the record is in these words: "The defendant stated in a letter of recommendation given the plaintiff in September, 1915, that the plaintiff's work had been 'excellent — careful and conscientious.' The court finds that the tone and words used by the plaintiff on the night of July 25 were not respectful to the defendant. The provocation under which the plaintiff was then acting explains, although it does not justify the plaintiff's remarks. The words addressed to the defendant by the plaintiff on the piazza next day were not respectful. The plaintiff had not been invited to come upon the piazza, but the matter of apology or what would follow if no apology were made, was left open at a previous interview and the plaintiff was justified in going to the defendant to have the matter settled. His statements at this time are explained, though not justified, by the fact that he felt that the apology had been unjustly demanded of him. The court finds that the words or conduct of the plaintiff did not on either occasion amount to acts of insubordination. The court finds that the language of the plaintiff, upon the facts found herein, did not justify the defendant in discharging the plaintiff because of his refusal to apologize therefor."

The facts as found must be accepted as true. The only question is whether as matter of law on these facts, with all inferences rationally to be drawn therefrom, the finding of the judge in favor of the plaintiff can stand.

The relation of master and servant imposes upon each, touching the work to be performed, the duty to be reasonably respectful to the other both in words and behavior, and to refrain from

insolent or imperious conduct. Among the obligations resting upon the servant as an implied term of the contract is that he shall not be insubordinate but shall show just regard for the rights and person of the employer. The reciprocal obligation of the master is that he shall not be arrogant or excite resentment, or wantonly wound the feelings of his employee. But petty annoyances and trifling irritations are likely in many kinds of employment. Not every act of discourtesy or every slight disrespect justifies a termination of the relation. Insubordination imports a wilful disregard of express or implied directions and refusal to obey reasonable orders. When this is established, it is such a breach of duty on the part of the servant as to warrant his discharge.

The words of the plaintiff, while lacking in ordinary politeness on both occasions, did not amount to insubordination. They were a breach of courtesy, but did not indubitably manifest a disposition not to perform his contract. No order respecting his work was disregarded. He was acting under some provocation due to the conduct of the defendant, which, although unintentional, might have been construed as designed to cause annoyance. The statement by the defendant that the plaintiff must apologize was not an order as to work. It was rather the interpretation put by the defendant upon the gravity of the conduct of the plaintiff. The refusal of the plaintiff to follow this suggestion was not necessarily insubordination. Both the demand and the refusal rested in part upon a construction of the motive which prompted the spoken words. Apparently, from the facts found by the judge, there was misunderstanding in this respect by each party. Persons living under the conditions here disclosed, when innocent misunderstandings or other stress arise, may be obliged to exercise some forbearance toward each other. Doubtless a servant may be discharged rightly for disrespectful words or conduct. Hasty utterance of the nature here disclosed touching a single matter is not necessarily a breach of contract or a sufficient ground for ending it. Whether the language used by the plaintiff and his manner under all the circumstances were sufficient basis for his discharge, so far as it is a question of fact, has been decided adversely to the defendant. It does not appear upon this record that by the refusal to grant requests for rulings or otherwise, the



judge misdirected himself in any matter of law. No error of law is disclosed. *Crabtree v. Bay State Felt Co.* 227 Mass. 68.

*Exceptions overruled.*

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BRIDGET BOYLE, administratrix, *vs.* WORCESTER CONSOLIDATED  
STREET RAILWAY COMPANY.

Worcester. September 30, 1918. — October 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Street railway.*

A motorman operating a street railway car in a city street, not going at an excessive rate of speed and sounding the gong, cannot be found to have been negligent in running down a traveller on foot who stepped from a place of safety directly in front of the moving car, if the motorman had no reason to suppose that the foot traveller was unaware of the approaching car and, as soon as it was evident that the traveller was in a place of danger, did all that could be done to check the speed of the car.

TORT by the administratrix of the estate of Luke A. Boyle, late of Worcester, under St. 1907, c. 392, for causing the death of the plaintiff's intestate by running into him with a street railway car of the defendant on September 4, 1915, on Front Street in Worcester. Writ dated November 12, 1915.

In the Superior Court the case was tried before *Morton, J.*, who at the close of the plaintiff's evidence, which is described in the opinion, on motion of the defendant ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

*J. H. Meagher, E. Zaeder & C. F. Boyle*, for the plaintiff.

*C. C. Milton, J. M. Thayer & F. H. Dewey*, for the defendant.

CARROLL, J. The plaintiff's intestate was struck by one of the defendant's cars while walking across Front Street, in Worcester, from the Common in the direction of Commercial Street, about five o'clock in the evening of September 4, 1915. He died from his injuries.

Front Street at this point is sixty feet wide and paved with granite blocks. The southerly rail of the defendant's east bound

track is about twenty-one and a half feet, and the southerly rail of the west bound track about thirty-two feet, from the curb on the sidewalk on the Common side. The day was clear. The car which struck the intestate was going in a westerly direction, from eight to twelve miles an hour, and the view east and west from the scene of the accident was unobstructed for a distance of seven hundred feet. When near the southerly rail of the east bound track, the plaintiff's intestate put his hands to his head, — apparently a gust of wind disturbed his hat, — and continued walking in a northeasterly direction. The car going west was then from seventy to seventy-five feet away.

There was no evidence of negligence on the part of the motorman. The car was not going at an excessive rate of speed, and it was undisputed that the gong was sounded; the motorman had no reason to anticipate that the intestate was unaware of the approaching car, and would step from a place of safety directly in front of it; as soon as it was evident that the deceased was in a place of danger the motorman did all that could be done to check the speed of the car. *Connors v. Worcester Consolidated Street Railway*, 228 Mass. 357. *O'Donnell v. Bay State Street Railway*, 226 Mass. 418. *Donahue v. Massachusetts Northeastern Street Railway*, 222 Mass. 233. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536.

In *Murphy v. Worcester Consolidated Street Railway*, 225 Mass. 264, relied on by the plaintiff, there was evidence that the car was moving at a high rate of speed; that no signal of its approach was given; and that the motorman could have seen the team in charge of the intestate coming down the driveway on to the track.

As there was no evidence of the defendant's negligence, it is unnecessary to consider the question of the due care of the intestate.

*Exceptions overruled.*

## JOHN JORDAN, administrator, vs. ADAMS GAS LIGHT COMPANY.

Berkshire. September 30, 1918. — October 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; CARROLL, JJ.

*Negligence*, In use of electricity. *Wires*. *Electricity*. *Evidence*, Declarations of deceased persons, Opinion: experts. *Practice*, *Civil*, Exceptions, Judge's charge.

A boy about twelve years of age was found lying on his face on the ground "with his arms all spread out and his legs" close to the gutter of a street near a pole of an electric light company supporting an electric light. His body was burned badly by electricity. His clothing looked as if he had been rolled in the dirt and "around the pole was just as clean as you would take a broom and sweep it." A flash of light had been seen at that place. A wire was hanging from the pole, the end of it being at least three feet and eight inches from the ground. A witness testified that this wire "was curled up on the end" and that about "four or five inches of this wire was all burned up like a crust of bread." The boy died the next day without conscious suffering. The accident occurred after the enactment of St. 1914, c. 553. In an action against the electric light company for causing the boy's death, it was *held* that there was evidence for the jury of negligence on the part of the defendant.

In the case above described the jury found for the defendant on a count for conscious suffering. Subject to the defendant's exception certain alleged declarations of the boy were admitted in evidence under R. L. c. 175, § 66. *Held*, that these declarations had been made immaterial upon the count for conscious suffering by the verdict on that count; and it was *said* that the declarations could not be considered as evidence in support of the count for causing death, because, if the boy after such injuries had been sustained did not suffer consciously before his death on the day after the accident, he could not be found to have made intelligent declarations, and accordingly that the alleged declarations had not been considered as evidence by this court.

In the case above described it was assumed, in the absence of any exception to any part of the judge's charge, that the judge properly had instructed the jury to disregard the alleged declarations if the boy did not suffer consciously.

Upon an exception in the case above described to the admission of the testimony of an expert on electricity and its effect upon the human body, on the ground that the witness was not qualified properly as an expert, where the evidence as to the qualification of the witness was rather meagre but such evidence was not wholly absent and the excepting counsel had declined to cross-examine the witness upon that subject, it was *held* that there was nothing to show that the presiding judge had not exercised his discretion properly in passing upon the witness's qualification as an expert.

TORT by the executor of the estate of Everett Forbes, late of Adams, against the Adams Gas Light Company, a corporation

operating a system of electric street lights in the town of Adams, for negligently causing the conscious suffering and death of the plaintiff's intestate by injuries sustained by him on April 12, 1917, by his coming in contact with a loose wire of the defendant highly charged with electricity hanging from a pole of the defendant at the corner of Mill Street and Allen Street in Adams. Writ dated June 25, 1917.

The first count of the declaration was for conscious suffering of the intestate and the second for causing his death.

In the Superior Court the case was tried before *Lawton, J.* The evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for the defendant, first, on the first count of the plaintiff's declaration, second, on the second count of the plaintiff's declaration, and, third, on both counts of the plaintiff's declaration. The judge denied the motion and submitted the case to the jury on both counts. On the first count, for conscious suffering, the jury found for the defendant. On the second count, for causing death, the jury returned a verdict for the plaintiff in the sum of \$4,800. The defendant alleged exceptions, including the exceptions relating to the admission of evidence which are described in the opinion.

The case was submitted on briefs.

*J. B. Ely*, for the defendant.

*F. M. Myers & T. F. Cassidy*, for the plaintiff.

*Rugg, C. J.* The plaintiff seeks to recover damages for the conscious suffering and death of his intestate, a boy about twelve years of age. There was evidence tending to show that, at a little before ten o'clock on an April evening in 1917, he left a woman neighbor at her door. A short time afterwards he was heard whistling as he returned by her house. A few moments later from a window she saw a "kind of a flash" from the direction of a street corner nearby. Others testified to seeing the flash of light. The boy presently was found lying on his face on the ground "with his arms all spread out and his legs" close to the gutter near a post or tower of the defendant which supported an electric light. His body was badly burned by electricity. He sustained other injuries and died the next day. His clothing bore the appearance of his having been rolled in the dirt, and "around the pole was just as clean as you would take a broom and sweep it." From

the tower or light of the defendant was hanging a wire, the distance of the end of which from the ground was variously estimated, the lowest being three feet and eight inches.

The accident occurred since the enactment of St. 1914, c. 553, which provides that in a case like the present the deceased shall be presumed to have been in the exercise of due care. Therefore, upon the evidence which has been recited, it was necessary to submit the question of the due care of the deceased to the jury. *Duggan v. Bay State Street Railway*, 230 Mass. 370. *Mercier v. Union Street Railway*, 230 Mass. 397. Whether the boy received his injuries by coming unconsciously or innocently in contact with the end of a heavily charged wire while walking on the highway, as argued by the plaintiff, or by climbing upon the tower of the defendant and intermeddling with the wire, as urged by the defendant, was matter of fact. The way in which the lighting system of the defendant operated, the arrangement of its circuits and the effect of a broken wire, were all pertinent factors in reaching a decision as to the ultimate fact. But they did not warrant a ruling of law that the defendant was not liable. There were circumstances and inferences which tended to support the contention of the plaintiff. See *Boutlier v. Malden Electric Co.* 226 Mass. 479, 485.

There was evidence sufficient to support a finding of negligence on the part of the defendant. The defendant's wire, which according to the testimony of one witness also "was curled up on the end and . . . I should think it was four or five inches of this wire was all burned up like a crust of bread," was enough upon this point. *Thomas v. Western Union Telegraph Co.* 100 Mass. 156. *Linton v. Weymouth Light & Power Co.* 188 Mass. 276. *Fry v. Postal Telegraph Cable Co.* 223 Mass. 496. The case at bar is distinguishable from *O'Donnell v. North Attleborough*, 222 Mass. 591.

The jury found in favor of the defendant on the count for conscious suffering. This renders immaterial the exception to the admission of the declarations of the deceased under R. L. c. 175, § 66. Such declarations of the deceased cannot now be considered as evidence to support the plaintiff's case. They have not been so considered in this opinion. Presumably one who sustained injuries of the nature here disclosed could not make intelligent declarations if he did not suffer consciously. No exception was

saved to the charge. It may be assumed as against the excepting party that adequate instructions were given to the jury to disregard utterly the declarations in the event of a finding against the plaintiff on the count for conscious suffering.

The record in the case at bar does not show that the ruling, permitting the witness Walsh to testify as an expert on electricity and its effect on the human body, was erroneous in law. His qualifications appear to have been rather meagre but not wholly absent, and the opposing counsel declined to cross-examine him upon that point. The competency of a witness offered as an expert rests largely, although not exclusively, within the discretion of the presiding judge. *Commonwealth v. Spencer*, 212 Mass. 438, and cases collected at page 448. *Fourth National Bank of Boston v. Commonwealth*, 212 Mass. 66, 68. *Harrington v. Boston Elevated Railway*, 229 Mass. 421, 429.

*Exceptions overruled.*

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WILLIAM O. WELLINGTON & another vs. LUCIE A. RAWSON  
& others.

Worcester. September 30, 1918. — October 14, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Aqueduct. Water Rights. Equity Jurisdiction*, To enjoin interference with private aqueduct. *Equity Pleading and Practice*, Mandatory injunction.

The owner of an easement to draw water from a spring on the land of another by means of a private aqueduct pipe leading from the spring through the land of a third person to a supply tank or distributor on his own land may maintain a bill in equity to enjoin a defendant from cutting the aqueduct pipe on the land of the third person and diverting the water from the spring to the defendant's land; and in such a suit it is not necessary to allege or to prove that the plaintiff was in actual possession of the land to which such easement was appurtenant when such cutting and diverting were committed; nor is it necessary to allege or prove that the plaintiff suffered actual damage by the wrongful acts of the defendant, legal damage being presumed from the infringement of the plaintiff's right.

In the suit above described it appeared that the aqueduct right was created by an instrument signed by three persons, "each one to have an equal share of the water as the nature of the thing will admit," and that the instrument contained a restriction prohibiting a disposal of the water to any other person "but by the consent of all three of said proprietors." A master who heard the case found, on evidence warranting such a finding, that the restriction upon the sale of the

water was waived by mutual consent. *Held*, that, in the absence of a report of all the evidence, this finding must stand.

In the case above described the final decree ordered the defendant who had cut the aqueduct pipe to replace the pipe and restore it to the condition it was in at the time of the trespass and enjoined perpetually that and another defendant from interfering with the plaintiff's rights in the water. *Held*, that, on the facts found by the master, the plaintiff was entitled to a mandatory injunction and that the final decree was proper.

**BILL IN EQUITY**, filed in the Superior Court on July 31, 1917, by the owners of a parcel of land with the buildings thereon in Oxford on the road leading from Oxford to Charlton, which formerly belonged to Willis M. Wellington, the plaintiffs being the widow and son of Willis M. Wellington and owning the land as tenants in common.

The bill alleged that the premises came to Willis M. Wellington through successive deeds from one Sterns Witt, that the defendant Lucie A. Rawson was the owner of a tract of land in Oxford with the buildings thereon, which formerly belonged to one Richard Olney, that by an agreement recorded in the registry of deeds, dated October 15, 1824, between Richard Olney, Jonathan Davis and Sterns Witt, Richard Olney granted to Sterns Witt certain water rights or aqueduct rights now appurtenant to the plaintiffs' land, consisting of a spring on the land formerly of Richard Olney, now of the defendant Lucie A. Rawson, a pipe leading therefrom and a supply or distributing tank, called a distributor, in a building on the land of the plaintiffs, that later in the summer of 1916 the defendants, or one of them, cut off the supply pipe leading from the spring to the distributor and connected the supply pipe with the land occupied by the defendant Carroll H. Rawson and that thereafter no water came to the distributor. The prayers of the bill were, first, "that the defendants, their servants and agents, be perpetually enjoined from interfering with the supply pipe running from the springs to the distributor, and from interfering with the flow of water from the springs to the distributor as provided in the agreement of the proprietors," second, "that the defendant Lucie A. Rawson be ordered to repair the supply pipe so that it will be in as good order and condition as it was in before it was interfered with and cut off, and so that it will supply water from the springs to the distributor," and, third, for further relief.

The case was referred to a master who filed a report containing the findings which are described in the opinion. The defendants filed exceptions to the master's report founded on six objections. The sixth was not argued and was treated by this court as waived. The other objections on which the exceptions were founded were as follows:

"1. For that the master was not warranted in finding that the right to the water was appurtenant to the Wellington premises, unless he also found that any right to the water that might be appurtenant to the Wellington premises was subject to all the reservations mentioned in the original agreement, and referred to in the deed from Warner to Wellington.

"2. For that the master was not warranted in finding that Jonathan Davis and Sterns Witt (who were the parties together with Richard Olney in said original agreement), and their legal representatives or successors in title, waived the reservation in said original agreement requiring their consent to the disposal of the water, by the fact that on one occasion said Davis and said Witt were parties to a conveyance of certain rights to Sibley and Barton, said Sibley and Barton not being in any sense predecessors in title of the plaintiffs as appears from the chain of title from Olney to Wellington as the same is recited in the report.

"3. For that the master failed to find that the plaintiffs' right to the water was subject to all the reservations, liabilities and incumbrances mentioned in the original agreement of Olney, Davis and Witt.

"4. For that the plaintiffs' right to the water being based upon the original agreement entered into by Olney, Davis and Witt, the master was not warranted in finding that the reservation in said original agreement requiring the consent of Jonathan Davis and Sterns Witt, or their legal representatives, to the disposal of the water, 'by mutual consent was waived,' it being stipulated in the master's report that the deeds upon which this finding is based 'are hereinbefore reported.'

"5. For that the master was not warranted in finding upon the deeds set forth in the report (and upon which deeds the master bases his said finding) that the plaintiffs had or have any right to the water."

The exceptions were heard by *J. F. Brown, J.*, who made an



interlocutory decree overruling the exceptions and confirming the master's report. Later the judge made a final decree ordering, (1) that against the defendant Lucie A. Rawson the bill be dismissed, (2) that the defendant Carroll H. Rawson "forthwith, at his own expense, replace and restore the water pipe so that it will be in as good condition as it was at the time he cut the supply pipe," (3) perpetually enjoining the defendants Charles I. Rawson and Carroll H. Rawson from interfering in any way with the plaintiffs' water rights described in the bill, and (4) allowing to the plaintiffs costs taxed in the sum of \$35. The defendants appealed.

The whole of the instrument creating the plaintiffs' easement, omitting the signatures, was as follows:

"Articles of Agreement made this fifteenth day of October, in the year of our Lord eighteen hundred and twenty-four By and between Richard Olney, Esquire, Jonathan Davis, Esqr. and Sterns Witt, Gentleman and all of Oxford, in the County of Worcester, witnesses. That whereas the said Olney Davis and Witt are about to make an Aqueduct to convey the water to their respective buildings on said Oxford plan, the spring or source of said aqueduct being on Land of said Olney and the trench for which also the aqueduct is to pass is through said Olney's land mostly, now therefore the said Richard Olney for himself, his heirs, Executors and Administrators covenants with the said Davis and Witt, their heirs, exr. & Admr that said Davis & Witt shall have an equal right in said aqueduct with himself that is to say, the said Olney to be at one third part of the expense, and the said Davis & Witt to be at one third part each and the said aqueduct to be owned by said Olney, Davis & Witt in three equal shares, each one to have an equal share of the water as the nature of the thing will admitt; and is further agreed by the parties aforesaid that in all future repairs of said aqueduct it shall be at the equal expense of the parties aforesaid whenever two out of the three shall think best, but that no disposal of the water shall ever be made to any other person, but by the consent of all three of said proprietors or their legall representatives.

"And the said Olney further agrees with the said Davis & Witt that whereas there is another spring of water a little southerly of the head of said aqueduct which may be let into the one aforesaid

with little expense, that should it ever be thought necessary by the parties aforesaid to conduct the water from said spring into said aqueduct the said Davis & Witt are to have an equal right with said Olney to the same, they being at two thirds parts of the expense. For the fulfilment of the foregoing agreement we severally bind ourselves each to the other in the penal sum of one thousand dollars.

"In witness whereof, we have hereunto set our hands and seals the day and year above written."

*E. J. McMahon*, for the defendants.

*M. N. Pilsworth*, for the plaintiffs.

CARROLL, J. In 1824 Richard Olney was the owner of the Campbell farm, so called, in Oxford, Worcester County. On October 15 of that year he entered into an agreement under seal, with Jonathan Davis and Sterns Witt, to build an aqueduct to carry water from certain springs on the Campbell farm to their respective buildings, "the spring or source of said aqueduct being on Land of said Olney and the trench for which also the aqueduct is to pass is through said Olney's land mostly." All the parties to the agreement were to have equal rights in the aqueduct, "each one to have an equal share of the water as the nature of the thing will admitt." Each was to pay one third of the expense of construction "but that no disposal of the water . . . [should] ever be made to any other person, but by the consent of all three of said proprietors or their legall representatives." In 1825 Olney conveyed the farm to Benjamin F. Town and Andrew Sigourney, Jr., together with "all the privileges and appurtenances thereto belonging including all the privileges I have in the aqueduct lattelly laid in said farm," reserving to Davis and Witt their rights under the agreement of October 15, 1824. By deed of December 6, 1825, Town, Sigourney, Davis and Witt conveyed to Sibley and Barton the right to draw water from the aqueduct for "their respective tenements."

By mesne conveyance the plaintiffs became the owners of the land of Sterns Witt; and the master found that the aqueduct has supplied water to the premises for more than sixty years and has been considered as an appurtenance thereto. In 1880, when the land was purchased by Willis M. Wellington, now deceased, there was a pipe leading "from said springs on Camp Hill to a

distributor located in the house of said Wellington from which radiated ten pipes, one going to the house and one to the barn of said Wellington, and the other eight were attached to pipes leading to other houses in the village of Oxford." The plaintiffs are the widow and son of Willis M. Wellington.

The master found that Carroll H. Rawson, one of the defendants, entered the land of one Verry, through which land the aqueduct ran, cut the pipe so that the water could not flow to the distributor, then attached a pipe leading to the house occupied by Rawson; and when William O. Wellington, one of the plaintiffs, entered the Verry land for the purpose of repairing the pipe, Charles I. Rawson under threats of personal violence prevented him from making the repairs. There was a decree for the plaintiffs.

The first contention of the defendants is that the bill does not state a case for equitable relief because there is no allegation of damages, and it is not stated that the plaintiffs were in possession of the premises. Assuming the question is now open, the bill alleges that the plaintiffs are the owners of the premises, formerly owned by Sterns Witt, to which the water rights are appurtenant. It is sufficiently alleged that the water came from a spring to the distributor located in the plaintiffs' building, and that the plaintiffs received their water supply from this distributor; that the pipe was cut; and in other ways the plaintiffs' easement in the water supply was interfered with, without right, by the defendants. As the plaintiffs according to the averments of the bill are the owners in fee of the premises to which the easement is appurtenant, and there was a substantial interference with their rights, they are entitled to the protection of a court of equity, even if not in actual possession of the premises at the time the trespass was committed. It is not essential to allege that the plaintiffs suffered damage by the acts of the defendants. The plaintiffs' right was invaded. In such a case "no special damage, no actual pecuniary loss need be stated or proved; the law presumes that a party sustains some damage from the infringement of his right, and enables him to maintain an action, whether he have suffered actual damage or not." *Atkins v. Bordman*, 2 Met. 457, 469.

In the deed from Warner to Willis M. Wellington, dated December 22, 1880, the water rights are conveyed subject to the

reservations contained in the original grant for the aqueduct. The defendants object to the master's finding that the right was appurtenant to the Wellington land, unless he found that "any right to the water that might be appurtenant to the Wellington premises was subject to all the reservations mentioned in the original agreement."

It was found that Olney conveyed the Campbell farm February 15, 1825, to Town and Sigourney with the water rights, reserving to Witt and Davis their rights and privileges in the same; that while Town and Sigourney were the owners of the estate they joined with Witt and Davis in conveying to Sibley and Barton certain rights in the water supply; that Witt and Davis, who were parties to the original agreement, by joining in the conveyance to Sibley and Barton recognized the right of Olney to transfer his rights in the aqueduct to Town and Sigourney; that all subsequent deeds referred to this right or privilege belonging to the parties to the original grant; that none of the parties ever dissented from the various conveyances, and that the restriction prohibiting the sale or disposal of water "but by the consent of all three of said proprietors" was waived by mutual consent. Without intimating that the several owners of the land would be denied relief in equity against a trespasser who without right injured the water supply, notwithstanding the particular restriction in the original agreement limiting the right to dispose of the water, we see no error in the finding of the master. See, in this connection, *Dennis v. Wilson*, 107 Mass. 591; *Willets v. Langhaar*, 212 Mass. 573, 575. By his conveyance to Town and Sigourney, Olney assigned all his right, title and interest in the farm and the easement annexed to it, subject only to the right of the other proprietors. He no longer had any right or title in the same, and the other proprietors by joining in the sale to Sibley and Barton recognized the Olney grantees as part owners of the aqueduct. While all the deeds are shown, all the evidence is not reported, and this finding of the master cannot be disturbed. On the evidence appearing in the record he was amply justified in finding, as he did, that the original restriction was waived. The exceptions based on the defendants' first five objections were therefore overruled properly.

The sixth exception is not argued and we treat it as waived.

The final decree ordered Carroll H. Rawson to replace the pipe and to restore it to the same condition as at the time of the trespass, and that the defendants Charles I. Rawson and Carroll H. Rawson be perpetually enjoined from interfering with the plaintiffs' rights set out in the bill. On the facts found and stated by the master in his report, this final decree was proper. *Szathmary v. Boston & Albany Railroad*, 214 Mass. 42.

The interlocutory decree overruling the exceptions to the master's report, and the final decree, are affirmed with costs.

*So ordered.*

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ATTORNEY GENERAL vs. WILLIAM ARMSTRONG & others.

Suffolk. March 21, 22, 1918. — October 15, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Religious Society. Bromfield Street Methodist Episcopal Church in Boston. Trust, Construction, Appointment and removal of trustees.*

Under a deed of land to trustees to hold it forever in trust and to erect thereon a house of worship "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and Discipline which from time to time may be agreed upon and adopted," it was held that the beneficiary of the trust was the local religious society which was formed in connection with the church edifice that was built by the trustees from the trust fund on land purchased for the purpose from that fund and which occupied that edifice as their place of worship from the time of its erection until its sale under legislative authority.

The religious society referred to above was called the Methodist Religious Society in Boston and comprised what formerly were two societies, merged into one and bearing the name of the original society by order of the bishop of the Methodist Episcopal Church in accordance with the discipline of that church, and it was held that the property rights of the Methodist Religious Society in Boston, as it was before the merger, vested in the consolidated society bearing the same name, for whose benefit it was the duty of the trustees to hold and administer the fund derived from the lawful sale of the church land and building, conforming to the rules and discipline of the church from time to time agreed upon and adopted.

The trust deed referred to above contained the provision that, when one or more of the original trustees "die or cease to be a member or members of said Church," the minister having charge of the "members of the said church" shall call a meeting for filling the vacancy and that a person eligible to election must have been a "member . . . of said Church" for one year immediately preceding. At a pre-

vious time the Supreme Judicial Court under its general chancery powers, in a suit in equity invoking its aid, had appointed a board of trustees because at that time there were no trustees chosen in accordance with the terms of the trust deed. *Held*, that this appointment of trustees by the court did not abrogate the provisions of the trust deed providing in express terms for the perpetuation of the board of trustees and did not impose forever on the court the duty of selecting and appointing trustees; and that, a board of trustees having been constituted by the court, vacancies in that board must be filled according to the terms of the trust deed, which had become operative for that purpose.

In the interpretation of a deed a significant word used according to the common and approved usage of the language, which is repeated in the same clause of the instrument, is to be understood to have been used the second time in the same rather than in a different sense.

In the case described above it was *held* that the requirement in the trust deed that a trustee must be and continue to be a member "of said Church" meant a member of the local religious society.

In the same case it appeared that by the practice of the Methodist Religious Society in Boston, as followed for many years, whenever one of the trustees ceased to be affiliated with that society, his position as trustee was treated as vacated. It appeared that two trustees, who at the time of their appointment by the court were members of the Methodist Religious Society in Boston, afterwards transferred their membership from that society to other local societies. *Held*, that, by force and effect of the trust deed, these two trustees by their change of membership had vacated their offices as trustees.

In the same case it appeared that two of the trustees appointed by the court were not members of the Methodist Religious Society in Boston, although members of the Methodist Episcopal Church, and had not joined afterwards the local society. There was nothing in the bill directed to their removal and no prayer for their removal. *Held*, that the removal of these trustees was not required.

In the same case it appeared that there was another trustee appointed by the court, who was not a member of the Methodist Episcopal Church but belonged to another denomination. At the hearing on the petition for the appointment of trustees it had been represented to the court by all parties in interest that his appointment was desired. He was the organist of the society and was one of its board of trustees. No deceit was practised on the court in regard to his appointment. It was alleged in the petition that all the persons whose appointment as trustees was requested were "members of the Methodist Episcopal Church." The fact that he was not a member was overlooked at the time, but it was known to all the other trustees and to the counsel who presented the petition and no party in interest was under any misapprehension on the subject. *Held*, that the removal of this trustee was not required.

In the same case, in regard to still another of the trustees, it appeared that he had presented to his co-trustees a bill for \$809 and interest for reimbursement for an alleged expense which he had incurred in the course of his duty as a trustee, that \$809 was the full amount of a claim for rent against the trustees but that this trustee had settled the claim for \$277 and had taken an assignment of the claim to its full amount, and that when he presented his bill for reimbursement to the trustees he did not tell them that he had paid only \$277 for the assignment. A master found that this trustee "must have known or should have known that it was improper for a person to personally profit from a fund of which he was one of the trustees." When the draft of the master's report had been com-

pleted this trustee paid back to the trustees the money thus paid to him under the assignment. *Held*, that the conclusion of the master could not be disturbed, and that the repayment by the trustee when the master's report was filed did not do away with the effect of his previous acts, and that this trustee must be removed.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on June 4, and amended on December 7, 1917, by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, an unincorporated religious association, and of certain of the surviving trustees under the deed of William Hall Jackson to Amos Binney and others, dated March 24, 1806, and referred to in the opinion as the Jackson deed, against five of the trustees under that deed, containing the prayers which are quoted below.

The prayers of the bill were as follows:

"1. That a temporary injunction may issue from this honorable court restraining said Armstrong, Crawford, Heath, Sleeper, and Stewart, trustees under said deed of William Hall Jackson to Amos Binney and others, and each of them, until the further order of this court, from using or expending any of the proceeds of the sale of the Bromfield Street Church property, and any accumulations thereof now or at any time hereafter held or controlled by them or either of them, for any purpose other than the necessary expenses and repairs upon the real estate held by the trustees, or for payments on account of principal or interest of any mortgage thereon, or to the responsible officials of said Methodist Religious Society for its use as aforesaid.

"2. That the court will determine the rights of said Methodist Religious Society in and to the trust funds held by the trustees under the Jackson deed, and will decree that the income thereof shall be paid over from time to time to said Methodist Religious Society for its use as hereinbefore declared.

"3. That the court will decree that the provisions of said Jackson deed relative to the filling of vacancies in the number of the trustees are now in force.

"4. That the court will vacate so much of its decree of January 17, 1913, as relates to said Alvah G. Sleeper, and will remove said Sleeper from his office as trustee and direct the remaining majority trustees, Armstrong, Crawford, Heath, and Stewart, forthwith,

to meet at the call of the stationed minister to fill the vacancies upon said Board of Trustees in accordance with said Jackson deed.

"5. In the alternative, that the court will remove said Armstrong, Crawford, Heath, and Stewart, and appoint two or more suitable persons as temporary trustees, who shall meet forthwith with the remaining three trustees and elect trustees to fill the vacancies in the number of trustees in accordance with the terms of said Jackson deed, said appointed trustees to resign when the full number of nine trustees shall have been so elected.

"6. For such other and further relief as to this honorable court shall seem meet and the case may require."

And the following added by the amendment:

"7. That the places of said William Armstrong and Alexander S. Heath as trustees under said Jackson deed be declared vacant, and that their places be ordered to be filled in accordance with the terms of said deed.

"8. That the court will remove said George A. Crawford from his position as trustee under said Jackson deed."

The part of the Jackson deed creating the trust, divided by the insertion of numbers in brackets as referred to in the opinion, was as follows:

"To Have and To Hold all and singular the above mentioned and described lot or piece of ground with all the privileges thereto belonging or in any wise appertaining unto . . . for ever in trust [1] that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and Discipline which from time to time may be agreed upon and adopted by the Ministers and Preachers of the said Church at their general conferences in the United States of America and [2] in further trust and confidence that they shall at all times forever hereafter permit such Ministers and Preachers belonging to the said Church as shall from time to time be duly authorized by the general conferences of the Ministers and Preachers of the said Methodist Episcopal Church, or by the yearly conferences authorized by the said general conferences and none others to preach and expound Gods Holy Word therein and [3] in further trust and confidence that as often as any one or more of the Trustees hereinbefore mentioned shall die or cease



to be a member or members of said Church according to the rules and Discipline as aforesaid then and in such case it shall be the duty of the stationed Minister or Preacher authorized as aforesaid who shall have the pastoral charge of the members of the said church to call a meeting of the remaining Trustees as soon as conveniently may be and when so met the said Minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them whose office have been vacated as aforesaid provided the person or persons so nominated shall have been one year a member or members of the said Church immediately preceding such nomination and of at least twenty-one years of age and the said Trustees so assembled shall proceed to elect and by a majority of votes shall appoint the person or persons so nominated to fill such vacancy or vacancies in order to keep up the number of nine Trustees for ever and in case of an equal number of votes for and against the said nomination the stationed Minister or Preacher shall have the casting vote. [4] Provided Nevertheless That if the said Trustees or any of them or their successors have advanced or shall advance any sum or sums of money or are or shall be responsible for any sum or sums of money on account of the said premises and they the said Trustees or their successors be obliged to pay the said sum or sums of money, they or a majority of them shall be authorized to raise the said sum or sums of money by selling the pews in the said house when completed for that purpose subjecting the purchasers, however to the rules and Discipline of the said Methodist Episcopal Church as aforesaid forever or by a mortgage on the said premises or by selling the said premises after notice given to the Pastor or Preacher who has the oversight or charge of the Congregation attending divine services on the said premises if the money due be not paid to the said Trustees or their successors within one year after such notice given and if such sale take place the said Trustees or their successors after paying the debt and all other expenses which may be due from the money arising from such sale, shall deposit the remainder of the money arising from such sale in the hands of the Stewards belonging to or attending Divine Service on the said premises which surplus of the produce of such sale so deposited in the hands of the said stewards shall be at the disposal of the next yearly conference authorized as as

aforesaid which said yearly conference shall dispose of the said surplus money according to the best of their Judgment for the use of the said Society."

The case was referred to a master, who filed a report containing the findings that are stated in the opinion. The Attorney General and the defendants filed exceptions to the master's report. The case was heard upon the exceptions by *Pierce, J.*, who at the request of the parties reserved it upon the pleadings, the master's report and the exceptions thereto for determination by the full court.

*J. T. Pugh*, (*W. A. Kneeland* with him,) for the relators.  
*A. G. Sleeper*, for the defendants.

RUGG, C. J. Different aspects of the present litigation have been before this court twice. In *Crawford v. Nies*, 220 Mass. 61, it appeared that the real estate on Bromfield Street in Boston, where formerly worshipped the Methodist Religious Society in Boston, commonly known as the Bromfield Street Society, had been sold and there was disagreement as to the persons who as trustees should hold the proceeds. Several questions there were settled. It was held in that decision (1) that a public charitable trust in perpetuity was established by the Jackson deed of 1806, (2) that by the Jackson deed the legal title to the land was vested in trustees for the use of the ecclesiastical body worshipping in the building erected thereon, (3) that the consolidation of the Methodist Religious Society in Boston with the Eighth Methodist Religious Society, under the name of the former, was legal and merged the two into a single society. It also was decided that on the record then before the court (1) there had been no termination of the trust established by the Jackson deed, and (2) that the trustees appointed by the court by decree of 1913 were entitled to the possession of the fund. It there was pointed out, however, that whether the trust created by the Jackson deed had been terminated and hence whether the church trustees had supplanted the court trustees, were questions with reference to which the record did not disclose a full trial.

After rescript but before final decree in that suit the defendants, who comprised the church trustees, the presiding bishop and others, were allowed to file a cross bill, wherein were set forth divers facts respecting the history of the Bromfield Street Church,

its establishment and maintenance, concluding with prayers that the fund should be continued in the possession of the church trustees to the exclusion of those appointed by the court. In substance and effect it was sought by the cross bill and the new facts disclosed at the full hearing thereon to secure a different conclusion from that reached on the record as it stood when the cause was first heard. The issue on the cross bill was stated in *Crawford v. Nies*, 224 Mass. 474, at page 482 (when that cause was here for the second time), in these words: "The question for decision is, whether upon the record now presented the order for the decree, 'that the trustees appointed by the court decree of 1913 are entitled to the proceeds of the sale of the Bromfield Street real estate and are to hold them in accordance with the trusts of the Jackson deed of 1806,' should be reversed or modified." The question as thus stated was decided after an elaborate discussion in harmony with the earlier decision. It was said at page 489: "The trustees so appointed [by the court in 1913] were officers of the court, subject to its supervision and control, and being seised of the legal title . . . and having been empowered to sell, they could make, execute and deliver a valid conveyance of the property. . . . A sale having been made, the trustees thereafter held the proceeds under the terms of the Jackson trust. . . . We have reviewed the history of this trust at much greater length than would have been desirable if the plaintiffs, [in the cross-bill] . . . had not urgently contended that the trustees under the decree should be discharged and that the alleged trustees and their successors appointed solely under ecclesiastical authority should be declared the trustees to administer the trust subject only to the rules and Discipline 'of the Methodist Episcopal Church in the United States of America.'" The final sentence of that opinion, expressive of the judgment of the court, simply ordered "that the cross bill should be dismissed." Thus it is made plain beyond peradventure that the single question then under consideration was, which board of trustees was entitled to the fund and whether it was to be held under the trusts established by the Jackson deed. The cross bill was dismissed because the plaintiffs therein were held not entitled to receive the fund and it became immaterial to inquire who the beneficiary under the Jackson deed was. *Lima v. Campbell*, 219 Mass. 253, 258. The cross bill having been dis-

missed, the order for a decree made by the first judgment stood, namely, that "the trustees appointed by the court decree of 1913 are entitled to the proceeds of the sale . . . and are to hold them in accordance with the trusts of the Jackson deed."

It thus is rendered apparent that no decision has been made respecting the beneficiaries under the Jackson deed. That subject has not been involved in the previous judgments and any reference to it was in connection with different matters. All that was said in each of these opinions was directed to the decision of the questions there presented. There was careful deliberation upon those points. It is the general rule that other statements in illustration of the questions actually decided are seldom considered in all their bearings and must be restricted to the propositions decided. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 545.

It follows that the ascertainment of the beneficiaries under the Jackson deed remains for decision and is not *res judicata*. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 46. *Leverett v. Rivers*, 208 Mass. 241, 244. *Newhall v. Enterprise Mining Co.* 205 Mass. 585, 588.

It was intimated in the second opinion that under proper circumstances the Attorney General might bring proceedings concerning the further administration of the trust. It may be in consequence of that suggestion that the present proceeding was instituted. This is an information by the Attorney General brought at the relation of the Methodist Religious Society in Boston, an unincorporated religious body acting by named representatives, and of other individual members of that society and of three of the trustees appointed by the court in 1913 against all those trustees. The purpose of the information, as stated in its prayers, is (1) to determine the beneficiaries under the Jackson deed and in particular the rights thereunder of the Methodist Religious Society in Boston, (2) to enforce the provisions of the Jackson deed as to filling vacancies in the board of trustees, (3) to remove certain of the trustees.

1. The fundamental rule in the interpretation of a trust instrument is to ascertain the intent of the founders from the language employed read in the light of the contemporary circumstances, state of the law and public conditions, the object to be accomplished and all other attendant facts actually or pre-

sumably within the knowledge of the parties. The determination of the beneficiaries of the trust created by this deed depends primarily upon a correct interpretation of the words used. Those words of the Jackson deed are printed on pages 199, 200. It is to be observed that four specific purposes are enumerated in this declaration of trust. These are indicated in the copy printed on pages 199, 200 by the insertion of arabic numerals in brackets. The first purpose is the establishment of a house of worship "for the use of members of the Methodist Episcopal Church in the United States of America." Although these words are free from ambiguity, it is manifest as matter of common knowledge as well as from the context in which the words occur that the ascertainment of the persons who may be members of that church must depend upon the "rules and Discipline" of the constituted authorities of the ecclesiastical denomination thus described. That matter ordinarily is within their jurisdiction. *Grosvenor v. United Society of Believers*, 118 Mass. 78, 91. *Carter v. Papineau*, 222 Mass. 464. How such membership may be established, whether by affiliation with separate societies only, or otherwise, and through what instrumentalities a place of worship may be put to the use of such members, whether through societies organized or recognized by the ecclesiastical authority, or otherwise, also are questions dependent for their solution upon the "rules and Discipline" of the church. The facts stated in this record show that membership in the church ordinarily is acquired only by membership in a local society. While the church is regarded as single and not as a confederation, yet its administration as an ecclesiastical denomination necessarily involves the establishment of local societies each owing fealty to the central church. Apparently no such body is known as a general association of members of the church. The only relation is that of members in a local society organized, recognized and governed as to such matters as are within its jurisdiction by the central authority of the church and its subdivisions. The words of this clause of the Jackson deed, "according to the rules and Discipline" of the church as from time to time adopted, modify the entire preceding phrase and afford the guide whereby also to determine the details of "the use" of the house of worship as well as membership in the church. This is the common grammatical construction. *Clarke v. Treasurer & Receiver General*, 226

Mass. 301, 303. Membership in the church and in the local society and the use of the church therefor are to be determined according to the "rules and Discipline" of the church.

It being true that membership in the Methodist Episcopal Church in the United States of America, so far as concerns laymen at least, exists only through membership in a local society, the first purpose stated in the trust of the Jackson deed is satisfied by treating as the beneficiaries those who are members of the local society and who as such are members of the one general church.

The second purpose of the trust, by making imperative the acceptance of such minister as may be assigned to the pulpit of the church, implies the existence of a local society to occupy the building. This power of appointing preachers to all local societies has been called "a cardinal rule of the church." *Hosea v. Jacobs*, 98 Mass. 65, 68. It constitutes the essential link between the general conferences of the church and the local society. This purpose of the trust expresses the obligation of the local society to acknowledge its dependence upon the central church authority for the vital matter of pulpit supply. It recognizes by inference a corresponding power respecting that matter as being reposed in that church authority. It has been held that the use of a building as a place of worship for the Methodist Episcopal Church cannot be continued after the general ecclesiastical authorities have resolved no longer to send its preachers there. *Henderson v. Hunter*, 59 Penn. St. 335, 342.

The third purpose of the trust relates to the selection of successive trustees to administer the trust. Reference is made to the "stationed Minister or Preacher . . . who shall have the pastoral charge of the members of the said church." The indubitable implication of these words is a local society under the ecclesiastical authority of the general church.

The fourth purpose of the trust refers among other matters to the possible sale of the church property for the payment of obligations incurred by the trustees. The local society is expressly recognized as the chief beneficiary of the trust in the provision that the yearly conference shall dispose of the surplus derived from such sale "for the use of the said Society." This last word can mean only the local society established in connection with the

edifice in question. The words "Stewards" and "Congregation" occurring in this connection point in the same direction.

Doubtless it was an inferable limitation that the society should continue to exist. But a determination as to the ultimate beneficiaries of the fund in case the local society should cease to exist is not now required because the local society continues to exist.

It was natural in 1806 for a company of church worshippers in Boston to adopt the expedient of a deed whereby the title to real estate should be taken in the names of a few persons to hold in trust so that the entire use and beneficial interest should be in the members of the society. This was due to the parochial and ecclesiastical history of the Commonwealth during the provincial and early State period. *Attorney General v. Federal Street Meeting-house*, 3 Gray, 1, 40. See *Parker v. May*, 5 Cush. 336, 349. The idea of a church building, the legal title to which stood in trustees without an accompanying society attached to it and beneficially interested in it, would have been difficult of comprehension to people in Massachusetts in 1806. *Baker v. Fales*, 16 Mass. 488, 504, 505. *Attorney General v. Merrimack Manuf. Co.* 14 Gray, 586, 602.

This analysis of the terms of the trust shows that the beneficiary under the Jackson deed was the local society, which was formed in connection with the church edifice on Bromfield Street. This is in conformity with the view expressed in a different connection in 220 Mass. at page 64.

The case has been referred to the same master who already has made two full reports in the former case and whose report now filed covers every material aspect of the facts bearing upon the question whether the beneficial interest in the land and in the fund now standing in its stead was in the society which conducted worship upon the premises or in the persons who might choose to go there to attend the services. The master has found that the first society in Boston for worship according to the doctrines of the Methodist Episcopal Church was formed in 1794. A chapel was erected in the following year. It continued to be the only church of that denomination until 1806, when its male members voted that it was expedient to erect without delay another church building in Boston for the accommodation of many who could not gain admission to the chapel because it was so small. Nine

persons, Jackson being one, were chosen as trustees to take the title to the necessary land and they were fully empowered "in behalf of this society" to purchase the land and make every needful contract to erect the church building. The trustees voted that "Bro. Jackson be authorized to purchase a suitable piece of ground whereupon to erect a chapel, making the contract in his own name and taking a deed to himself and then convey to us as trustees." The so called Jackson deed was the result of this vote. The purchase price was not paid by Jackson but by the trustees, and Jackson acted throughout as their agent. The Bromfield Street building was dedicated in November, 1806, and thereafter a building on that site was used continuously until its sale in 1913 as a place of worship exclusively by the same society. An original book entitled "Accounts of the Trustees of the Methodist Religious Society, Boston" was sufficiently identified and rightly received in evidence by the master. It shows some donations, but the receipts were chiefly from loans and mortgages. The Jackson deed was in the precise form prescribed by the discipline of the Methodist Church then in force except in a now immaterial particular. The church organization in 1806 was known as the "Methodist Episcopal Church in the United States of America," the last six words being a part of the title of the organization. All members of the church are members of the Methodist Episcopal Church in the United States of America, such membership being acquired only through being joined in membership in one of the several local societies or "charges," except that bishops and travelling ministers are members of the Church and not members of any local society. Aside from this, there are no members of the Church at large who are entitled to the use of a church building of the Methodist Episcopal Church in any way other than worshipping with a local society in accordance with the discipline and rules. Although it is not certain when the name, the Methodist Religious Society in Boston, was adopted for the society using the Bromfield Street church, by whatever name or names it may have been known it is the same society whose male members in 1806 voted to buy land and build the church and which, after the edifice was erected, occupied it as a place of worship continuously until its sale in 1913.

The defendant Crawford was the plaintiff in the suit before the court in 220 Mass. 61, and his associates as court trustees and the



church trustees and others were the defendants. He alleged in his bill and the defendants by their answer admitted that the trust was for the benefit of the Methodist Religious Society in Boston. The master narrates a considerable number of other facts, including St. 1808, c. 70, and St. 1828, c. 144, all without exception showing that from the beginning it was the purpose and intent of all persons connected with the trust established by the Jackson deed, that the Methodist Religious Society in Boston was its beneficiary. His conclusion is in these words: "There is no question that the Society has had the use and benefit of the property from the time of the erection of the building until it was sold, and that until its sale it was considered by all officials of the Society including the persons who have acted as trustees and the Church authorities that the Society was entitled to all the benefits arising from the property and that it has been held and managed under the understanding that the Society had the sole beneficial interest therein." No one apparently ever has doubted that the beneficiary under the Jackson deed was that society until a considerable time after the controversy arose, of which the present information is a part.

These findings of fact must be accepted as final, since the evidence is not reported and they are consistent with each other. It is unnecessary to determine how many of them are material and competent. They all are in harmony with the terms of the trust instrument. They show that from the beginning until the present controversy all the parties in interest, both trustees and beneficiaries, have by their words and actions put a practical construction upon the meaning of the trust deed in this particular in conformity with its correct interpretation.

It appears from the master's report that the statement of trust in the Jackson deed was in the form, so far as here material, commonly adopted throughout the United States by the Methodist Episcopal Church before 1806. The determination of the beneficiary under such form of deed has come before courts of other States in numerous instances. It always has been held, in harmony with the conclusion which we have reached, that the trustees under such form of trust deed hold the church building and estate for the benefit of the local society worshipping therein. *Gibson v. Armstrong*, 7 B. Mon. 481. *Brooke v. Shacklett*, 13 Grat. 301,

314-318. *Fair v. First Methodist Episcopal Church*, 12 Dick. 496. *Haskinson v. Pusey*, 32 Grat. 428. *Price v. Methodist Episcopal Church*, 4 Ohio, 515, 546-548. *Newman v. Proctor*, 10 Bush, 318, 319, 325. *Henderson v. Hunter*, 57 Penn. St. 335, 340, 342. *Deepwater Railway v. Honaker*, 66 W. Va. 136, 141.

The beneficiary under the Jackson deed is the society known as the Methodist Religious Society in Boston. That society, as held in 220 Mass. at page 66, now comprises what formerly were two societies which have been merged into one, bearing that name by order of the bishop in accordance with the discipline of the church. It is the duty of the trustees to hold and administer the trust fund for the benefit of that society. The property rights of the Methodist Religious Society in Boston as it was before the merger follow and inhere in the consolidated society bearing the same name. It has been treated by the constituted authorities of the church as the same society. It has continued to be and is the same society in contemplation of the law. In the performance of their duty the trustees in general must conform to the rules and discipline of the church, which (to quote the words of the Jackson deed) "from time to time may be agreed upon and adopted by the Ministers and Preachers of the said Church at their general conference in the United States of America." It is manifest that these words mean the rules and discipline existent at the time the question arises, not those prevailing at the date of the deed in 1806. There is nothing at all at variance with this in *Sohier v. Trinity Church*, 109 Mass. 1, 23.

It is no objection to the execution of the trust that a building is now provided for the Methodist Religious Society in Boston and held by other trustees. The fund, so far as not needed for the repair and maintenance of that building, may be devoted in accordance with the rules and discipline of the church for the benefit of the society. That has been the practical interpretation of the trust through all the years. In 1808 a part of the land conveyed by the Jackson deed was sold and the proceeds applied to the general purposes of the society. The early trustees fitted up the cellar of the church for renting and later raised the building and rented stores on the first floor. The income from these sources was applied to the general expenses of the society. The master has found that "the quarterly conference is the medium which

has authority to define how and under what circumstances the use of property held under the disciplinary deed [which the Jackson deed is] shall be made available, and is the supreme authority of the local society." It must be assumed that this finding is in accordance with the rules and discipline of the church.

It follows in the opinion of a majority of the court, that the fund, representing and standing as it does in the place of the Bromfield Street real estate, must be applied to the use and benefit of the society in accordance with the rules and discipline of the church. See, in this connection, *Watson v. Jones*, 13 Wall. 679, 729, 730; *Trustees of Trinity Methodist Episcopal Church v. Harris*, 73 Conn. 216, 222, 223; *Hardy v. Wiley*, 87 Va. 125, 128; *Fair v. First Methodist Episcopal Church*, 12 Dick. 496, 499, 502; *Sanders v. Meredith*, 78 W. Va. 564.

2. The trust established by the Jackson deed provides by its express terms for the perpetuation of the board of trustees. The aid of the court in the exercise of its general chancery powers has been invoked twice to appoint trustees, because there were no trustees chosen in accordance with the terms of the trust deed. But, in the opinion of a majority of the court, that did not abrogate the provisions of the Jackson deed in this regard, nor impose forever thereafter on the court the duty of selecting and appointing trustees. The court has come to the assistance of the trust in order that it might not fail through want of trustees. But the terms of the trust deed are to be followed in the selection of successors to the trustees appointed by the court whenever vacancies occur. Its terms revive as soon as it becomes practicable to comply with them. A board of trustees having been constituted by the court, vacancies in that board must be filled according to the terms of the original trust instrument, which become now operative and susceptible of effective action to that end.

The qualifications of trustees prescribed by the Jackson deed are not free from doubt. It is provided that when one or more of the original trustees "die or cease to be a member or members of said Church," the minister having charge of the "members of the said church" shall call a meeting for filling the vacancy and that a person eligible to election must have been a "member . . . of said Church" for one year immediately preceding. The word "church" occurs three times in this clause of the deed. In its

second use it must refer to the local society. That is not open to question. With some hesitation we incline to the view that it has the same meaning in the other two instances. A significant word repeated in the same clause of an instrument, according to the common and approved usage of the language, should be understood to have been used in the same rather than a different sense. *Hall v. Hall*, 209 Mass. 350, 353. Practical considerations point to that as the preferable interpretation. Trustees to hold the title to church property naturally would be selected from the body of worshippers using that property and by whose contributions ordinarily it would be repaired and maintained. This is the interpretation adopted in *Gibson v. Armstrong*, 7 B. Mon. 481, 489, in which there was an able opinion by Chief Justice Thomas A. Marshall and which has been regarded as a leading case for seventy years. We are aware of no authority to the contrary. See *Brooke v. Shacklett*, 13 Grat. 301, 316. Since this appears to have been a form of deed in common use by the Methodist denomination throughout the country, it is desirable that harmonious construction be given to its provisions by the courts of the several States so far as may be conscientiously and rationally practicable. The practice of the Methodist Religious Society in Boston as followed for many years was in conformity with this view of its meaning. Whenever one of the trustees ceased to be affiliated with that society, his position as trustee was treated as vacated. This conception was manifested also in acts of the Legislature drafted presumably in accordance with their opinion as to existing requirements. We conclude, therefore, that eligibility to election to the board of trustees depends upon membership in the local society. It follows, also, from what has been said that when any one of the trustees who, at the time of his appointment by the court in 1913, was a member of the Methodist Religious Society in Boston, ceases to be a member of that society, he vacates his office as trustee. The result is that Heath and Armstrong, having transferred their membership from the Methodist Religious Society in Boston subsequent to their appointment as trustees to other local societies, thereby have vacated their offices as trustees, this being the force and effect of the terms of the Jackson deed.

3. Two of the trustees appointed by the court in 1913 were not

then members of the society, although members of the Methodist Episcopal Church, and they have not since joined that society. The reasons which led to their appointment are not set out in the record. The power of the court to appoint trustees is not open to doubt. Although naturally it would conform to the terms of the Jackson deed in making the appointments, there may have been conditions which rendered it impossible or not a wise exercise of its chancery power to conform precisely to its literal terms. Of course the trust would not fail even if no appropriate trustees were available possessing the qualifications specified in the deed. But, whatever may have been the circumstances leading to their appointment, there is nothing in the bill and no prayer directed to their removal.

One of the trustees appointed in 1913 by the court was not a member of the Methodist Episcopal Church but belonged to another denomination. It was represented to the court by the petitioner and all parties in interest that his appointment was desired. He made no representation personally respecting the matter. He was at that time the organist of the society and was much interested in its affairs. He was one of its board of trustees elected under the discipline of the church. No deceit was practised on the court touching his appointment. The petition was for the appointment as trustees of the board elected as trustees under the discipline. It was alleged in the petition that all the persons, whose appointment as trustees was requested, were "members of the Methodist Episcopal Church." The fact that he was not a member was overlooked at the time, but it was known to all the other trustees and to the counsel who presented the petition. No party in interest was under any misapprehension on the subject. His original appointment was valid. The court had jurisdiction of the matter and was not imposed upon as in *Sampson v. Sampson*, 223 Mass. 451. Under all these circumstances his removal is not required.

The grounds urged for the removal of another trustee are different. Certain members of the old Bromfield Street Society were not satisfied with its consolidation with the other society. They requested the trustees to provide a place of worship different from the church building of the consolidated society. A committee of the trustees was appointed for that purpose, of which Dr.

Crawford was chairman. He entered into a written contract for the use of rooms to that end with the trustees of Ford Hall. The ecclesiastical board of trustees then having possession of the fund refused to pay for this use. After a time the services were discontinued. The lessors then agreed with Dr. Crawford that, if payment was made for the time the rooms were actually used, no claim would be made for the unexpired term under the contract. He paid a total of \$277. He took, however, from the lessors an assignment of the entire claim under the contract. He thereupon presented a bill for \$809 to the treasurer of the board then having possession of the fund. The bill was not paid. After the fund was transferred to the trustees appointed by the court, he presented a bill for \$809 with interest for three years and nine months, amounting to \$991, and by vote of the trustees the treasurer gave him a check for that amount, which he collected. The master's further report upon this matter is in these words: "The defendant Crawford has offered no explanation of this transaction other than that the trustees of the Ford Building might have seen fit to have enforced their claim for the full amount and that he believed that under the assignment to him he was entitled to require payment of the full amount, and that he had no dishonest intention in making claim for the full amount. At the last hearing he stated, however, that, if it was determined that money had been wrongfully paid to him, he was willing to return it to the trustees. It did not appear that any of the others of the trustees knew of the amount which he had paid for the assignment nor that those who were present at the meeting and voted for the payment to Dr. Crawford made any investigation of the merits of his claim. The vote was passed without discussion. When he presented the bill for \$809 to Lockwood, Dr. Crawford did not tell him that he had paid but \$277 for the assignment, and in the former hearings before me when the matter of his having paid the bill for the use of the rooms and his having taken an assignment to himself was testified to it was not stated how much he had paid. After Lockwood had declined or neglected to pay the bill, Dr. Crawford placed it in the hands of counsel, but did not inform the counsel how much he had paid, nor did he turn over to him the receipted bills for what he had paid. Neither did he make before he presented his bill to Lockwood any inquiry for the purpose of ascer-

taining whether the trustees of the Ford Building had made any other use of the rooms during the remainder of the term. I am not satisfied with the explanation of Dr. Crawford in regard to this matter. He is a man of wide experience and during the time he has been involved in this long litigation has made a study of trusts and the duties of trustees, and I find that he must have known or should have known that it was improper for a person to personally profit from a fund of which he was one of the trustees. . . . After the final draft of the report had been settled the defendant Crawford has paid back to the trustees the money which had been paid to him under the assignment hereinbefore referred to." The master saw the witness and heard him testify and from such personal observation is better able to decide as to the real nature of this conduct than anybody can be from the reading of a transcript of his testimony. His conclusion under the circumstances is one which cannot be disturbed. *Parsons v. Parsons*, 230 Mass. 544, 552. Of course Dr. Crawford was entitled to be repaid with interest for disbursements made in the honest discharge of his duties. But it is manifestly unlawful and a gross breach of duty for a trustee to attempt to make personal profit at the expense of the trust fund by buying a claim against it at a discount and collecting it in full. See *Allen-Foster-Willett Co., petitioner*, 227 Mass. 551, 556; *Little v. Phipps*, 208 Mass. 331. The situation here disclosed exhibits such a disregard of the fundamental obligations of a trustee, that, notwithstanding his service in behalf of this trust hitherto may have been valuable, he ought not longer to remain a trustee. Repayment by him after the filing of the master's report does not do away with the effect of the previous transactions.

*Decree accordingly.*

CLARA E. SAWYER, administratrix, vs. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. September 30, 1918. — October 15, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Negligence, Street railway. Practice, Civil, Exceptions, Requests and rulings, Judge's charge, New trial.*

In an action by an administrator against a street railway company for causing the death of the plaintiff's intestate by striking him with the front corner of a street railway car of the defendant, when the intestate on foot had turned to cross the track in front of the moving car, the presiding judge instructed the jury, "that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other." The jury found for the defendant and, on exceptions alleged by the plaintiff, it was *held* that the instruction quoted was correct and was sufficient on the subject.

In the case above described there was evidence of the defendant that the intestate walked along in the street by the side of the defendant's track and then turned to the left and stepped on the track in front of the moving car, and it was *held* that the presiding judge properly refused to give an instruction requested by the plaintiff which was based on the assumption that the intestate was run into from behind by the defendant's car.

In the same case, where the judge sufficiently and accurately had stated to the jury the relative rights of a pedestrian on a highway and of a street railway company operating a car upon its tracks on the highway, it was *held* that this subject was covered sufficiently by the judge's charge and that it was the duty of the jury to consider the particular circumstances of the case as shown by the evidence to have existed at the time of the accident, as they correctly were told to do by the judge.

It is the duty of a presiding judge to state in his charge to the jury the principles of law applicable to the issues on trial, and it is within his province under R. L. c. 173, § 80, to state the testimony in his instructions fairly and impartially and to submit to the jury all questions of fact material to the issues in dispute without prejudice and without any attempt to influence their verdict. In the case above described it was *held* that the judge clearly and accurately and with apt illustrations pointed out to the jury the duty which the defendant's motorman, in the operation and management of the car, owed to the plaintiff's intestate.

Upon exceptions to certain portions of the charge of a presiding judge, where the counsel for the excepting party did not call the judge's attention at the trial to any particular insufficiency or inaccuracy in his instructions to the jury and no complaint was made that further or different instructions were not given, in order that the exceptions may be sustained it is necessary for the excepting party to show that some injustice has been done.

Upon an exception to an order of a judge denying a motion for a new trial, the



excepting party cannot raise for the first time an objection to the sufficiency of an instruction of the judge to the jury on a certain point in regard to which he had raised no question at the trial.

TORT by the administratrix of the estate of Charles H. Sawyer for causing the death, without conscious suffering, of the plaintiff's intestate on February 27, 1917, by knocking him down with a street railway car of the defendant on Millbury Street in Worcester. Writ dated March 22, 1917.

In the Superior Court the case was tried before *Fox, J.* The evidence is described in the opinion. At the close of the evidence the plaintiff asked the judge to make the following rulings:

"1. Street cars, while they must run on tracks provided for them, have no exclusive right of way which puts upon persons travelling otherwise the burden of constantly looking and listening for their approach, so that if they fail to do so and are injured their conduct should invariably be held to preclude recovery.

"2. It is always a consideration of importance, especially when the injured person is run into from behind, who first got the possession of the street; that is, was the injured person, having looked before going into the street, sufficiently ahead of the on-coming car or vehicle that he reasonably may expect its driver to see him and avoid running into him whether he continues in the line in which he is moving or turns to further cross the street.

"3. While it is unquestioned that the collision would not have occurred if the deceased had not attempted to cross the street, yet it cannot be ruled as a general proposition of law that the traveller is necessarily negligent because he attempts to cross a street even without first looking or listening to ascertain whether a vehicle is approaching. Such a traveller has a right, in the absence of anything to the contrary, to assume that other persons using the highway will exercise a proper degree of care toward him."

The judge refused to make the rulings requested except as they were covered by his charge to the jury. The jury returned a verdict for the defendant.

The plaintiff filed a motion for a new trial, alleging as a ground or reason therefor, among others, the following: "4. That the jury were given no instructions as to the applicability of St. 1914, c. 553, § 1, relative to the due care of the plaintiff, no reference to the

provisions of said statute relative to the presumption of due care of the plaintiff being made in the charge of the court to the jury, the action, however, being brought for the death of the plaintiff's intestate under the provisions of St. 1907, c. 375, § 1." The judge denied the motion.

The plaintiff alleged exceptions to the refusal of the judge to make the rulings requested by her, to certain designated portions of the charge, which are described in the opinion, and to the denial of her motion for a new trial.

*M. M. Taylor*, for the plaintiff. Captain *M. C. Taylor*, who assisted in the preparation of the brief, was absent on military service in France.

*C. C. Milton*, for the defendant.

CROSBY, J. This is an action to recover damages for the death of the plaintiff's intestate, who, while attempting to cross Millbury Street in Worcester at about eleven o'clock in the evening of February 27, 1917, was struck by an electric car of the defendant and received injuries which resulted in his death. Millbury Street extends in a northerly and southerly direction, and upon it at the place of the accident the defendant maintained double tracks.

The case was submitted to the jury and a verdict was returned for the defendant.

The plaintiff excepted to the refusal of the presiding judge to give three requests for instructions except so far as they were covered by the charge; and also, to certain portions of the charge, and to the denial of a motion for a new trial.

The usual questions of the plaintiff's due care and the defendant's negligence were submitted to the jury upon the issue of liability.

The plaintiff was not entitled to have her first request given even if it embodied a correct statement of the law. The presiding judge already had stated to the jury that, "It is said, and it is true, that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other." There was no contention made by the defendant that the deceased failed to look as the car approached him or that he was obliged to look and listen constantly for the approach of the car to entitle the plaintiff to recover. The instruction given was ample and sufficient.

The second request was framed upon the assumption that the deceased was run into by the car from behind. While the plaintiff's evidence tended to show that the deceased was attempting to cross the street to a white post "in a direct course and by a diagonal line," on the other hand, the defendant's evidence tended to show that the deceased walked alongside the track, then turned to the left and stepped upon it in front of the car and was struck by the front corner of the car. In view of the evidence, this request was properly refused.

There was no error in the refusal of the judge to give the plaintiff's third request. The relative rights of a pedestrian and of a street railway company operating its car upon the highway were sufficiently and accurately stated to the jury. It was the duty of the jury to consider the particular circumstances of the case as shown by the evidence to have existed at the time of the accident, and they were so instructed. *L'Hote v. S. B. Dibble Lumber Co.* 203 Mass. 294, 298.

The plaintiff excepted to three portions of the judge's charge, contending that the parts so excepted to amounted to a charge upon the facts, because the test of the motorman's care was incorrectly stated to the jury, and because the judge in his charge unduly emphasized the defendant's contention and did not sufficiently refer to the plaintiff's testimony and theory of the case. Upon a careful consideration of the portions of the charge excepted to, read in connection with the whole charge, we are of opinion that the criticisms made by the plaintiff are not well founded. It is the duty of the judge presiding over a jury trial, to state to the jury the principles of law applicable to the issues on trial, in order that they may arrive at an intelligent and just verdict. *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197, 200. *Williams v. Winthrop*, 213 Mass. 581.

Not only is it within the province of a presiding judge to state the testimony in his instructions (R. L. c. 173, § 80), but such statement is often helpful to the jury in applying the rules of law applicable to the issues presented. If a statement of the testimony is made by the judge, it should be fair and impartial; he should submit to the consideration of the jury all questions of fact material to the issues in dispute, without prejudice and without any attempt to influence their verdict. We find nothing in the

charge to indicate that the judge expressed any opinion upon any issue of fact or upon the weight or credibility to be given to any of the testimony.

In no part of the instructions do we find language which, reasonably construed, amounts to a charge upon the facts. *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 514, 515. The judge clearly and accurately and with apt illustrations pointed out to the jury the duty which the motorman, in the control and management of the car, owed to the deceased.

We are also of opinion that the portions of the charge excepted to were not misleading or biased, and that these portions of the instructions gave no undue prominence to the defendant's contention and made proper and adequate reference to the evidence presented by the plaintiff.

The judge's attention was not directed at the time to any particular insufficiency or inaccuracy in the instructions, and no complaint was made that further or different instructions should have been given. Under such circumstances, that these exceptions may be sustained it is incumbent on the plaintiff to show that some injustice has been done. We find nothing to warrant such a conclusion. *Rock v. Indian Orchard Mills*, 142 Mass. 522, 529. *Commonwealth v. Meserve*, 154 Mass. 64, 75. *Barker v. Loring*, 177 Mass. 389, 391. *Hamilton v. Boston Elevated Railway*, 213 Mass. 420, 423.

The only other exception is to the denial of the plaintiff's motion for a new trial. It is the contention of the plaintiff that the judge did not fully and accurately instruct the jury as to the effect of St. 1914, c. 553. Upon this question the instruction was as follows: "And the burden of showing a lack of due care on the part of Mr. Sawyer rests upon the defendant just as the burden of showing a lack of due care upon the part of the motorman rests upon the plaintiff." The plaintiff made no request for a ruling based upon the statute and raised no question at the conclusion of the trial as to the accuracy of the instruction as given. If the plaintiff felt that the judge, in addition to the instruction above referred to, should have stated to the jury, in substance, that under the statute the deceased was presumed to have been in the exercise of due care, it was her duty to make a request to that effect, or at the end of the charge call the judge's attention to the omission.

It is plain that the sufficiency of the instruction cannot now be raised, for the first time, by an exception to the denial of a motion for new trial upon that ground.

As no error appears upon the record, the entry must be

*Exceptions overruled.*

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FERDINAND MARTINEAU & another vs. DAN FOLEY & others  
& trustees.

Franklin. September 17, 1918. — October 18, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Conspiracy. Unlawful Interference. Labor Union.*

In an action by a building contractor against the members of a bricklayers' union for damages resulting from a conspiracy against the plaintiff and malicious interference with his business, there was evidence that the defendants, in pursuance of a common purpose agreed upon by them in combination, without any previous complaint or request to the plaintiff, sent out to mason contractors a notice that union masons would not work for the plaintiff until further notice as he "has been working Non Union Masons," that this was done under a vote passed by the union, "that all contractors be notified not to do any more work" for the plaintiff, "because all union men are to keep away from his jobs because he hires non-union masons," that the statement was untrue, as the only non-union mason employed by the plaintiff was one employed two months before to do seven hours' brickwork and the plaintiff did not know that he was a non-union man, that the plaintiff saw the president of the union and told him that he was willing to sign any agreement, but that the union at a subsequent meeting refused to take any action, and that the plaintiff, being unable to hire bricklayers by reason of the defendants' acts, took no more building contracts and suffered pecuniary loss. Held, that the plaintiff was entitled to go to the jury.

In the same case it also was held, that the sending out of the false statement with intent to destroy the plaintiff's business was malicious within the legal meaning of that word, being without legal justification, and entitled the plaintiff to recover substantial damages from each defendant who participated in the conspiracy irrespective of the degree of his activity in the wrongful acts.

TORT by copartners engaged in the building business in Turners Falls against the members of an association known as the Bricklayers' and Plasterers' Union No. 36 for damages resulting from a conspiracy against the plaintiffs and malicious injury to the plaintiffs' business. Writ dated August 19, 1915.

In the report of this case at a previous stage contained in 225 Mass. 107, it is stated that, after the sustaining by *Callahan, J.*, of a demurrer of the defendants, the plaintiffs amended their declaration by inserting certain words in the first and second counts "and adding a third count which was not demurred to." The last part of this statement, which is enclosed in quotation marks, is erroneous. It should have been as follows: A motion to add a third count was denied.

The defendants demurred to the first and second counts as amended and the demurrer was sustained by *Callahan, J.*, and, on appeal to this court, by the decision reported in 225 Mass. 107, the demurrer to the first count was overruled and the demurrer to the second count was sustained.

Thereafter the case was tried on the first count before *Jenney, J.* The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendants made a motion that a verdict be ordered for the defendants. The judge denied the motion. Thereupon the defendants, among other requests, asked the judge to make the following ruling: "On the evidence, at the most, only nominal damages can be awarded against any defendant." The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiffs in the sum of \$4,000; and the defendants alleged exceptions. The exceptions alleged included exceptions to certain portions of the judge's charge, but these exceptions, as stated in the opinion, were not argued by the defendants. There were also exceptions to the admission of certain evidence, which are summarized briefly in the opinion. The material exceptions were to the denial by the judge of the motion to order a verdict for the defendants and to his refusal to make the ruling requested.

*J. F. Jennings & W. P. Jennings*, for the defendants, submitted a brief.

*W. A. Davenport*, for the plaintiffs.

DE COURCY, J. The principal questions raised by the exceptions are, whether the evidence warranted a verdict for the plaintiffs, and, if so, whether the verdict could be for more than nominal damages. The jury could find the material facts to be as follows: The plaintiffs, Ferdinand Martineau and Arthur F. Martineau,

had been engaged in the building contracting business at Turners Falls since June 1, 1905, under the firm name of F. Martineau and Son. For some years the net annual profits of the business were \$3,000, after each partner had withdrawn \$1,500 as wages. In July, 1915, they had entered into certain contracts to erect and alter buildings, and were negotiating for others, intending themselves to do the carpenter work. They asked one Merriam, a mason contractor, to do the plastering or brickwork for them on a town hall job, but he refused, showing them the following notice:

"Bricklayers' and Plasterers' Union, No. 36  
of Massachusetts.

Headquarters  
304 Main St.

Meetings  
1st and 3d Wednesday Evenings  
Greenfield, Mass., July 11, 1915.

A. O. Merriam  
Phillips St.,  
Greenfield Mass.

Dear Sir:

A notice is hereby given to all Union Contractors that it was voted that all Union Masons will not work for Martineau & Son Contractors of Turners Falls until further notice as the said firm has been working Non Union Masons.

Bricklayers' & Plasterers' Int Union No. 36."

Similar notices had been sent to the other mason contractors in the vicinity who had working agreements with the union. This was pursuant to a vote passed by the union on July 9, 1915, "That all contractors be notified not to do any more work for Mr. Martineau & Son, contractors, Turners Falls, because all union men are to keep away from his jobs because he hires non-union masons."

The plaintiffs had not been asked to enter into any agreement with the union, never had received any complaint from the organization, and were not notified that such a vote was contemplated or was passed. On learning of the notice, one of the plaintiffs saw the president of the union, and told him they were willing to sign any agreement; but the union at a subsequent meeting discussed the matter and refused to take any action. As the plaintiffs were unable to hire bricklayers they took no more build-

ing contracts. Ferdinand obtained employment as foreman in a mill, and Arthur F. worked wherever he could get a job.

As matter of fact, it was not true that the plaintiffs customarily hired non-union masons, as the notice implied. The only semblance of support for that statement was the employment of one Vivier, two months before, to do seven hours' brickwork on the town hall job; and they did not know he was a non-union man.

These facts, and their legitimate inferences, plainly show an intentional and harmful interference with the business of the plaintiffs. The defendants not only refused to have business relations with the plaintiffs, but combined to prevent contracting masons from having business relations with them. It is apparent from the charge of the trial judge that the wrongful act of the defendants on which the plaintiffs relied was the means employed by the members of the union to accomplish their purpose, — namely, the circulation of a statement which was known to be untrue and was circulated to prevent the plaintiffs from employing or contracting with master masons. Even assuming that the purpose of the defendants was a lawful one, the means they employed to accomplish it were unlawful. The sending out of this false statement, with intent to destroy the business of the plaintiffs, was malicious within the legal meaning of that word, was without legal justification, constituted an unlawful conspiracy, and entitled the plaintiffs to recover substantial damages. *M. Steinert & Sons Co. v. Tagen*, 207 Mass. 394. *Martell v. White*, 185 Mass. 255. *Burnham v. Dowd*, 217 Mass. 351, 360. *Cornellier v. Haverhill Shoe Manuf. Association*, 221 Mass. 554, 562. The peaceful persuasion act does not purport to "justify attempts to persuade which are "a part of an unlawful or actionable conspiracy." St. 1913, c. 690.

It may be added that the defendants have not argued their exceptions to portions of the judge's charge. We find no error therein.

The gist of the action was not the alleged conspiracy, but the damage inflicted in pursuance of it. But, when a conspiracy was shown, the plaintiffs could look beyond the secretary who sent out the untrue and harmful notices, and recover from each defendant who participated in the conspiracy, irrespective of the degree of his activity in the wrongful act. The jury were warranted



in finding that these defendants either authorized or adopted the circulation of the untrue notice, or that it was sent out in pursuance of the common purpose agreed on by the combination. Evidence in support of this conclusion appeared, for instance, in the provisions of the by-laws of the union, binding each member to acquiesce in the will of the majority; the terms of the agreement between the union and the contractors and builders; the answer to interrogatory 16, that the notice complained of was mailed by the defendant Foley "As corresponding secretary, acting in his official capacity, on behalf of the Union as such;" the stipulation at the trial that all the defendants were members of the union when the vote was passed and when the notice was sent out, and were bound by the answers; the action of the union at its regular meetings in declaring and enforcing the boycott against the plaintiffs, in pursuance of the object of the association to compel the exclusive employment of union labor; and the failure of any of the defendants to dissent from the use of the wrongful means employed. *Burnham v. Dowd*, 217 Mass. 351. *Harvey v. Chapman*, 226 Mass. 191, and cases cited. *Martineau v. Foley*, 225 Mass. 107. *Baush Machine Tool Co. v. Hill*, ante, 30. *Lawlor v. Loewe*, 235 U. S. 522. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249.

What has been said disposes of all the exceptions of the defendants except those relating to the admission of evidence. The competency of many of the questions objected to is too plain for discussion. That is true, for instance, of the question to the defendant Alex, president of the union, "What did this young Mr. Martineau say to you?"; and the answer "He asked me what . . . the union had decided." The testimony of the plaintiff Arthur F. Martineau that he could not get bricklayers, and consequently could not go on with the Chevalier and Chapman street jobs, and that their profits on these contracts would be about \$200 on one and ten per cent of the cost of the building on the other, were admitted rightly. The plaintiffs had been employed by Chevalier to do his work on a percentage basis, and their bid on the Chapman Street job had been accepted. Many other questions were rendered harmless by the answers given. The defendants themselves put in evidence the length of time which Vivier worked for the plaintiffs, and cannot complain that the

plaintiffs were permitted to prove that same fact. Upon examination we find no merit in the exceptions taken to the admission of evidence.

*Exceptions overruled.*

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EDWARD G. MALLORY'S (dependent's) CASE.

Worcester. September 30, 1918. — October 18, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Workmen's Compensation Act, Waiver by insurer of objection to notice for insufficiency, Cause of death. Proximate Cause.*

In a claim under the workmen's compensation act, where it appears that a notice in writing of the injury was given to the insurer within the time required by the statute, in which the only possible inaccuracy was in stating the date of the injury to have been one day later than it was, and that at the hearing before the Industrial Accident Board the counsel for the insurer stated that "he did not wish to raise any question as to the giving of the notice of the injury," and the insurer did not object that the notice was insufficient until the case was before this court on appeal, it was *held* that it was unnecessary to consider the question of the alleged insufficiency of the notice, because this was not open to the insurer.

In a claim of a dependent widow under the workmen's compensation act, it appeared that the deceased employee in the course of his employment dropped a plank on the great toe of his left foot, injuring the toe severely, and that three or four days later he died at a hospital of septicemia. It appeared that the autopsy revealed a septic condition of the left knee with general septicemia and also disclosed that the knee joint was the primary seat of the infection. There was medical testimony by members of the hospital staff, which, if accepted as conclusive, showed that the employee's condition did not arise from his injury but was attributable solely to the general septicemia in his system. But the testimony of the dependent widow and of the physician who attended the employee and arranged for his admission to the hospital warranted a finding that the blow from the plank would be sufficient to cause the septic condition which followed it and resulted in his death. The Industrial Accident Board awarded compensation and their award was confirmed by a decree of the Superior Court and, on appeal, it was *held* that this court could not say as matter of law that the finding of fact was wrong.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Mary A. Mallory, as the dependent widow of Edward G. Mallory, late of Worcester, an employee of the J. W. Bishop Company, a cor-

puration conducting the business of a contractor and builder in Worcester, who received on April 17 or 18, 1917, the injury to his great toe described in the opinion, which was alleged to have caused his death from septicemia on April 21, 1917.

The case was heard by *Aiken*, C. J. The evidence reported by the Industrial Accident Board is described in the opinion. The report stated that the insurer asked the board to make the following rulings:

"1. There is no evidence from which the board can find that there was any injury suffered by the deceased in the course of the deceased's work for the J. W. Bishop Company.

"2. There is no evidence from which the board can find that there was any injury suffered by the deceased arising out of the work for the J. W. Bishop Company.

"3. On all the evidence the finding of the board must be that no payments are due the alleged dependent."

The board refused to make any of these rulings.

The Chief Justice made a decree, in accordance with the decision of the Industrial Accident Board, "that the deceased employee, Edward G. Mallory, received a personal injury which arose out of and in the course of his employment, on April 17, 1917, that as a result of conditions due to the said injury of April 17, the employee died on April 21, 1917; that the claimant, Mary A. Mallory, widow of the employee, lived with him at the time of his injury and death and that the said Mary A. Mallory is entitled to the weekly compensation of \$10 from the insurer for a period of four hundred weeks from April 17, 1917." The insurer appealed.

*C. C. Milton*, for the insurer.

*F. B. Hall & J. H. Mathews*, for the dependent widow, submitted a brief.

**BRALEY, J.** It is urged that the claim for compensation should be disallowed because it does not appear from the record that any notice of the injury had been given as required by St. 1911, c. 751, Part II, §§ 15, 16. But it appears that a notice in writing as required by the statute was actually given to the insurer, the only possible error in which was that the date of the accident was given as April 18 instead of April 17, and it is unnecessary to consider the effect, if any, of any question of variance, for, the counsel for the insurer having expressly stated before the Industrial Ac-

cident Board that "he did not wish to raise any question as to the giving of the notice of the injury," it cannot when defeated contend for the first time in this court on appeal that the notice was insufficient. *Cleveland v. Welsh*, 4 Mass. 591. *Brown v. Webber*, 6 Cush. 560, 563. *Dole v. Boutwell*, 1 Allen, 286, 287. *Oulighan v. Butler*, 189 Mass. 287.

The argument for reversal on the merits is, that there was no evidence warranting a finding that the deceased employee received an injury in the course of or arising out of his employment and that, the finding of the board having been based on mere conjecture, the decree awarding compensation to the widow must be reversed. We are not concerned with the weight of evidence or the credibility of witnesses, and the findings of fact in the report of the single member of the board which were affirmed and adopted on review must stand unless plainly unwarranted. *Herrick's Case*, 217 Mass. 111. The uncontroverted evidence recited in the report shows that the employee, a stock cutter, while carrying a plank from a pile of lumber in the mill yard to the saw where he worked dropped the plank on his foot, and on his own statements, which were admissible, and the evidence of his wife and of the physician who attended him before his removal to the hospital, it properly could be found that the blow injured the big toe of his left foot causing a ragged cut extending perhaps three quarters of an inch across the base of the nail from which blood oozed.

But, if the finding that the injury arose out of and in the course of his employment is amply sustained, the further finding is, that the employee died of septicemia, or blood poisoning. It is upon this finding that the principal contention of the insurer rests, that the injury described was not the cause of the employee's death. It was said in *Madden's Case*, 222 Mass. 487, 495, "The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause." The narration of his objective symptoms as given by his wife after he returned home on the day of the accident is, that both the toe and foot were swollen and "turned a purplish red" and the next day "the foot was puffed up; the toe, the foot and leg were puffed up to about the knee. It looked as if it were burst open. . . . It was a dark color, a reddish purple, dark red." The physician who attended him and

arranged for his admission to the hospital where he died three or four days after the injury substantially corroborated the evidence of the widow. It is argued that his injuries were insufficient to cause septicemia in so brief a period, and the autopsy revealed a septic condition of the left knee with general septicemia. It also disclosed that the knee joint which was found to be infiltrated with from three to four ounces of thin pus was the primary seat of the infection. If in connection with these apparently undisputed facts the question of the cause of death rested solely on the medical evidence of the hospital staff, the employee's condition did not arise from the injury, as he was then suffering from septic arthritis which had developed general septicemia in his system to which his death was solely attributable. The widow and claimant, however, was not conclusively bound by the evidence introduced by the insurer and, having presented evidence which warranted a finding that the blow from the plank would be sufficient to cause the septic conditions previously described and which caused his death, we cannot say as matter of law that the conclusion was wrong. *Crowley's Case*, 223 Mass. 288, 289. *Madden's Case*, 222 Mass. 487.

The rulings requested by the insurer were refused rightly and the decree should be affirmed.

*Ordered accordingly.*

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CASSIUS D. PHELPS vs. JAMES E. CREED & another.

SAME vs. CHARLES S. DAVISON & another.

Berkshire. September 10, 1918. — October 19, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Equity Pleading and Practice*, Amendment, Bill. Tax, Sale for non-payment.  
*Equity Jurisdiction*, To remove cloud from title.

A judge of the Superior Court has authority to allow the plaintiff in a suit in equity to redeem land from a tax sale to amend his bill into a bill to remove from the plaintiff's title a cloud created by a void tax sale or, if such tax sale shall be held to be good, to redeem from it. Prayers for such alternative relief properly may be joined in one bill.

Under R. L. c. 13, § 38, (now St. 1909, c. 490, Part II, § 39,) which provides that,  
 "The collector shall give notice of the time and place of sale of land for pay-

ment of taxes by publication thereof. Such notice so published shall contain a substantially accurate description of the several rights, lots, or divisions of the land to be sold, the amount of the tax assessed on each, and the names of all owners known to the collector," a sale by a collector of taxes of two lots of land one mile apart for a lump sum and his conveyance of them by one deed stating the balance due for taxes in each of the successive years on the two lots together, where the notice of the sale did not give the amount of the tax assessed on each lot for either of the years in question or the amount of unpaid taxes on each lot for either of those years, are absolutely void, and a bill in equity may be maintained by the owner of the two lots of land to set aside the tax deed as a cloud upon his title.

What effect, if any, St. 1915, c. 237, had on bills to redeem from lawful sales for non-payment of taxes which were pending when that statute took effect, here was mentioned as a question which did not arise in the present case, where a tax sale was set aside as unlawful.

TWO BILLS IN EQUITY, filed in the Superior Court on November 16, 1912, by the owner of two parcels of land in Williamstown against different defendants, to redeem such parcels from certain tax sales mentioned in the opinion, and amended, against the defendants' objections, on December 1, 1915, and September 20, 1915, by substituting bills to remove clouds from the plaintiff's title by setting aside the tax sales, with prayers for alternative relief as on bills to redeem, if the court should determine that the tax sales were valid.

The two cases were referred to a master and were heard by him together. The master filed a report, which contained the findings that are stated in the opinion. The defendants filed exceptions to the master's report, raising the questions which are discussed in the opinion. The exceptions and also a motion of the defendants to recommit the report to the master were argued before *Lawton, J.*, who made an interlocutory decree denying the motion to recommit, overruling the exceptions and ordering that the master's report be confirmed. Later by order of the judge a final decree was entered in each case declaring the tax sales to be void and ordering the defendants to execute quitclaim deeds to the plaintiff of the respective parcels of land with costs to the plaintiff. The defendants appealed.

*C. H. Wright*, for the defendants.

*J. M. Rosenthal*, (*W. A. Burns & J. B. Cummings* with him,) for the plaintiff.

*PIERCE, J.* These are two bills in equity to remove a cloud alleged to rest on the title of the plaintiff to two distinct parcels

of land, or, in the alternative, to redeem the same parcels, sold with other land for the non-payment of taxes assessed to George L. Phelps for the years 1905 and 1906 to the defendant Temple, who in March, 1909, executed and delivered to the defendant Creed a deed of the parcel described as the "Mountain Wood Lot" and in March, 1910, executed and delivered to the defendant Davison a deed of the parcel known as the "Sherman Farm."

The original bills were filed November 16, 1912, and were wholly bills to redeem. Notwithstanding the objections of the defendants (1) "That the plaintiff has no right to convert an original bill by amendment or otherwise, into a bill to remove cloud from title or to redeem;" (2) "That the petition of the defendant Davison in the Land Court for the purpose of registering his title . . . deprived this court of jurisdiction;" and (3) "That a bill to remove cloud from title cannot be joined with a bill in equity to redeem from tax sale," the bills were changed to their existent form by amendments allowed by a judge of the Superior Court in 1915 at the dates mentioned on page 229.

It is plain that the judge of the Superior Court in the exercise of his discretion had authority to allow any change in the form of relief prayed for which the court had authority to grant in the same cause of action. *Downey v. Lancy*, 178 Mass. 465. It is equally clear that there was no error in the joinder of two distinct specific grounds for equitable relief in one suit, *Garden Cemetery Corp. v. Baker*, 218 Mass. 339, 342, and that the plaintiff is not precluded by laches from maintaining these bills for the purpose of having the tax deeds declared void as a cloud upon his title. There is no evidence of title in the defendants acquired by adverse possession. *Tobin v. Gillespie*, 152 Mass. 219.

The facts as found by the master, upon which the plaintiff rests his contention that the tax sale to Temple was void, succinctly stated are as follows: The duly elected and qualified assessors of the town of Williamstown in 1905 and 1906 lawfully assessed to George L. Phelps a tax on two parcels of real estate, — one the "Farm" and the other the "Mountain Lot," — each being assessed separately each year. The total amount of all taxes, real, personal and poll, due the town of Williamstown from the said George L. Phelps for the year 1905, amounted to \$50.41. On or before March 1, 1906, \$35.41 had been paid, leav-

ing a balance due of \$15. The total amount assessed to George L. Phelps on his real estate in 1906 was \$45.82, and none of the taxes for the year 1906 had been paid when the lands were sold. On February 5, 1907, Sumner I. Prindle, the duly elected and qualified tax collector of the town of Williamstown, sent by mail, prepaid, to George L. Phelps a demand for payment of the balance of taxes for 1905, \$15, and taxes for 1906, \$45.82, which demand did not identify each parcel or give the amount of taxes assessed or due on each for either year. On February 22, 1907, the collector posted and published a notice of the sale. This notice "contained a substantially accurate description of two separate, distinct and non-contiguous parcels of real estate at least one mile distant from each other," namely, the parcels in question, but did not give the amount of the tax assessed on each parcel for the year 1905 and for the year 1906 or the amount of unpaid taxes on each parcel for either of those years, merely stating as follows: "the years of the taxation are 1905, balance due fifteen dollars (\$15.00) and 1906 the amount due \$45.82." On March 30, 1907, the collector made no attempt to sell each parcel separately, but attempted to sell and did purport to sell at tax sale for the non-payment of taxes, at one sale, by one deed, for one price, namely, \$90, the two parcels described in his notice to the defendant Temple, and on the same day executed and delivered, as such collector, to Temple a tax deed of both. The deed did not state the amount paid at the sale of each parcel, the full amount of taxes assessed in the year 1905, or 1906, on each parcel, or the amount of unpaid taxes on each parcel for these years; but merely described the taxes as "balance due fifteen dollars (\$15.00), for the year 1905, and for the year 1906 . . . the sum of \$45.82."

R. L. c. 13, § 38, (St. 1909, c. 490, Part II, § 39,) reads: "The collector shall give notice of the time and place of sale of land for payment of taxes by publication thereof. Such notice so published shall contain a substantially accurate description of the several rights, lots, or divisions of the land to be sold, the amount of the tax assessed on each, and the names of all owners known to the collector." The notice as published did not contain the amount of tax assessed on each parcel of land; and the precise question presented for decision is whether such omission causes the deed to be void, or merely irregular and defective.



It has long been held that separate and distinct parcels of real estate belonging to the same owner must be separately valued and assessed, and that no lien on any parcel is created or can be enforced by a sale for any other tax than that which was lawfully assessed upon it. *Hayden v. Foster*, 13 Pick. 492. *Hamilton Manuf. Co. v. Lowell*, 185 Mass. 114, 117. *Lancy v. Boston*, 186 Mass. 128, 133. In the case at bar the books of the assessors show the valuation of the specific parcels, the total tax upon both parcels, and by inference, the rate per cent at which the tax is assessed. The lien thus created on each parcel was computable and ascertainable, and no insuperable difficulty prevented the collector from stating in the notice the amount of the tax assessed on each parcel or from selling each parcel for a sum sufficient to pay the tax on that parcel. We think the failure to give notice in accordance with the statute, and the sale of the several parcels for a lump sum in excess of the lien upon any specific parcel were without authority of law. It follows that the deed was not merely irregular, or defective, but was absolutely void in its inception. *Charland v. Home for Aged Women*, 204 Mass. 563, 567. *Fuller v. Fuller*, 228 Mass. 441, 444.

It becomes unnecessary to determine the effect, if any, of St. 1915, c. 237, upon pending bills to redeem from lawful sales for non-payment of taxes.

None of the exceptions have been argued specifically, and, save as they are involved in the appeals from the final decrees, are treated as waived.

In each case the plaintiff is entitled to relief in equity, and the decrees are affirmed with costs of the appeal.

*So ordered.*

## ARTHUR A. ISELL &amp; another vs. GREYLOCK MILLS.

Berkshire. September 10, 1918. — October 22, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Tax*, Redemption from tax sale. *Watercourse*. *Equity Jurisdiction*, To enjoin interference with water rights, Damages. *Damages*, In equity.

One who has an interest in land as a tenant for life in expectancy is entitled to redeem the land from a tax sale.

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, it was found by a master that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, and it was held that the plaintiff as a riparian owner on a non-navigable stream had only a right to the reasonable use of the water in common with other riparian proprietors and that, whether the defendant so had diverted the flow of the brook as to injure the plaintiff in the exercise of his right, was a question of fact, on which the negative finding of the master was final, so that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the unauthorized diversion of the water.

BILL IN EQUITY, filed in the Superior Court on November 6, 1912, by the owners of certain land on West Main Street in North Adams through which flowed a stream called Sherman Brook, a natural watercourse emptying into the Hoosac River, against the Greylock Mills, a corporation, alleging that the defendant unlawfully diverted by a pipe the waters of the brook for the purpose of supplying its mill and other property with water, and praying (1) for an injunction to restrain the defendant from diverting the waters of the brook, (2) to restrain the defendant from using or maintaining its pipe across the plaintiffs' land, (3) for an order to the defendant forthwith to remove the pipe, (4) for damages, and (5) for further relief.

The answer asserted the right of the defendant, under a deed from Charles E. Sherman and others dated February 3, 1881, to maintain its pipe and divert the waters of the brook, except so much of those waters as the plaintiffs were entitled to use.

The case was referred to a master, who made a report containing the findings which are stated in the opinion. The plaintiffs filed exceptions to the master's report and the defendant also filed an exception. The plaintiffs' exceptions were based on the contention that the plaintiffs were entitled to substantial damages. The exceptions were argued before *Chase, J.*, who made an interlocutory decree overruling the exceptions and ordering that the report be confirmed and that the bill be dismissed. The plaintiffs appealed.

The plaintiffs then filed a petition alleging that they had discovered new facts and praying that the case be reopened and re-committed to the master. The petition was heard by *Wait, J.*, who made an interlocutory decree that the petition be dismissed and that the petitioners (the plaintiffs in the suit in equity) pay \$10 costs. The petitioners appealed.

Later the case was heard by *Chase, J.*, on a motion for a final decree. He made a final decree overruling the exceptions to the master's report, confirming the master's report and ordering that the bill be dismissed. The plaintiffs appealed.

The case was submitted on briefs.

*F. H. Cande & F. M. Myers*, for the plaintiffs.

*W. F. Hawkins & W. C. Kellogg*, for the defendant.

**BRALEY, J.** The defendant, while admitting that it has appropriated the water as alleged in the bill, justifies the alleged conversion under a grant which confers the right at least during the lives of the grantors *Diana F. Rice*, formerly *Diana F. Sherman*, and *Charles E. Sherman*, tenants for life under the will of *Russell Sherman*, who died seised of the farm through which the brook runs. The tenants however having died, the life estates fell in, and the plaintiffs who derive title to the land under *Leroy C. Sherman*, the only son of *Charles*, in whom the remainder would vest by the terms of the will, contend that the defendant's estate thereby terminated and that it became, and has continued to be, a trespasser.

But during the life of *Diana*, who predeceased *Charles*, the premises were sold for non-payment of taxes to one *Richardson*, who before the period of redemption had expired and prior to the deed to the mills conveyed the premises to *Charles*. The deed to the defendant being sufficient in form to pass whatever interest

Charles possessed, it pleads among other defences the tax title in bar. The contention of the plaintiffs that the tax sale was fraudulent is not supported by the record, and, there being no affirmative extrinsic evidence affecting the regularity of the assessment and levy, the recitals in the collector's deed are to be taken as true. Gen. Sts. c. 11, § 8; c. 12, §§ 28-33. St. 1911, c. 370. *Bates v. Sharon*, 175 Mass. 293. *Welch v. Haley*, 224 Mass. 261, 263. The title of the devisees accordingly was extinguished unless the estate was redeemed within two years from the date of sale, or relief within five years was sought in equity. Gen. Sts. c. 12, §§ 36, 42. *Weeks v. Grace*, 194 Mass. 296, 300. *Davis v. Allen*, 224 Mass. 551. *Holbrook v. Brown*, 214 Mass. 542.

While Charles did not hold in common with Diana, and owed no duty to her or to the remainderman to pay taxes, he had a legal interest in the land as tenant for life in expectancy which entitled him to redeem. *Rogers v. Rutter*, 11 Gray, 410. *Hurley v. Hurley*, 148 Mass. 444. *Stone v. Stone*, 163 Mass. 474. *Hillis v. O'Keefe*, 189 Mass. 139. *Rogers v. Lynn*, 200 Mass. 354. The title of the life tenants would not be destroyed until the period of redemption expired, and under the agreed statement of facts the deeds are incorporated by reference. If they are read especially as to the consideration named in each in connection with the facts, that his mother is given the use for life of all the testator's estate on condition that if the testator's sister desired "to live and and board with my wife during her life that my wife shall give her that support," and that no other home where these provisions could be carried out except the farm is shown, the presumption, which we find nothing in the record sufficient to overcome, is that Charles never intended to act adversely to his mother's interests, but redeemed for his own benefit. *Hurley v. Hurley*, 148 Mass. 444, 446. *Solis v. Williams*, 205 Mass. 350, 353. *Callihan v. Russell*, 66 W. Va. 524. It is unnecessary to decide whether upon redemption, and in what proportions, he could have enforced contribution from the other devisees.

And, the tax title never having matured, the devisees held their respective estates in accordance with the provisions of the will. *Langley v. Chapin*, 134 Mass. 82, 88, 89.

Nor has the defendant acquired any rights by prescription. The remainderman, the plaintiffs' only grantor with title, had no

right to possession until the death of his father, which occurred less than twenty years before the present suit was brought. *Mister v. Woodcock*, 154 Mass. 535.

The defence of laches, although not pleaded, is also urged. The circumstances however are insufficient to justify the court on its own initiative to dismiss the bill. *Stewart v. Joyce*, 201 Mass. 301.

But, even if the bill can be maintained for injunctive relief under the first, second and third prayers, the plaintiffs, who had no exclusive ownership therein, cannot recover damages for the water taken by the defendant which are sought in the fourth prayer. The rights and duties of riparian owners on non-navigable streams having been fully discussed in *Elliot v. Fitchburg Railroad*, 10 Cush. 191, and in *Stratton v. Mount Hermon Boys' School*, 216 Mass. 83, 87, need not be restated.

The question, whether the defendant had so diverted the flow of the brook as to injure the plaintiffs in the exercise of their rights to the beneficial use of the stream and to have the water come to their land without any unreasonable diminution, was a question of fact. *Pratt v. Lamson*, 2 Allen, 275, 290. The diversion having been for a reasonable use leaving enough water for their needs, the master reports, that the plaintiffs offered no evidence of actual damages, and finds that they have suffered no actual damages. The finding is decisive not only of any claim that the defendant must pay for the water used after the plaintiffs became the owners at the same rates as the rates charged for water by the city where its mills are located, but of the right to more than nominal damages. *Elliot v. Fitchburg Railroad*, 10 Cush. 191. *Stratton v. Mount Hermon Boys' School*, 216 Mass. 83, 87. The case of *Bliss v. Rice*, 17 Pick. 23, relied on by the plaintiffs as permitting compensation based on the value of the use which the defendant made of the water, is not in point, as the plaintiff in that case had acquired the absolute right to the use of all the water. The distinction between such a right and the reasonable use of the water in common with other riparian proprietors, which is all that the plaintiffs at bar had, is fully considered in *Pratt v. Lamson*, 2 Allen, 275, 287, 288. The master's finding also disposes of any claim for actual damage for the maintenance of the pipe or disturbance of the soil which may be caused by its removal, but

nominal damages should be awarded for the invasion of the plaintiffs' right to undisturbed possession. *Appleton v. Fullerton*, 1 Gray, 186, 194. *Lund v. New Bedford*, 121 Mass. 286, 290.

The result is that the interlocutory decree denying the plaintiffs' petition for a rehearing and recommittal of the report is affirmed, and the final decree in so far as the plaintiffs' exceptions are overruled and the report confirmed is also affirmed, but in all other respects it is reversed with costs.

*Ordered accordingly.*

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AMERICAN PRINTING COMPANY *vs.* COMMONWEALTH.

P. J. HARNEY SHOE COMPANY *vs.* SAME.

BUTCHER POLISH COMPANY *vs.* SAME.

Suffolk. October 18, 1918. — October 28, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Corporation, Taxation. Tax, On income.*

Under St. 1918, c. 255, § 1, which provides that, "Every corporation incorporated under the laws of this Commonwealth and doing business for profit shall pay a tax to the Commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States," a corporation, which has paid to the United States a war excess profits tax for the year in question, in computing its net income for such taxation by this Commonwealth is to deduct the amount of such war excess profits tax paid by it, because under U. S. St. 1917, c. 63, § 29, the amount of such war excess profits tax is deducted from the net income of the corporation on which it is required to pay a tax to the United States.

THREE PETITIONS, filed in the Supreme Judicial Court on October 7 and 8, 1918, respectively by three corporations incorporated under the laws of this Commonwealth and doing business for profit, under St. 1918, c. 255, § 7, praying for the abatement of a portion of the income tax which was imposed upon each of such corporations under § 1 of that statute and was paid by each with a protest.

An order of court was made by *Braley, J.*, consolidating the three cases in order that they might be heard together, and

thereafter the cases came on to be heard before *Braley, J.*, who, at the request of all the parties, reserved them upon the pleadings for determination by the full court.

*J. F. Jackson*, (*C. F. Rowley* with him,) for the American Printing Company.

*C. R. Lamson*, (*G. E. Holmes* of New York with him,) for the P. J. Harney Shoe Company.

*C. H. Walker*, for the Butcher Polish Company.

*W. H. Hitchcock*, Assistant Attorney General, for the Commonwealth.

*Rugg, C. J.* It is provided by St. 1918, c. 255, § 1, that, "Every corporation incorporated under the laws of this Commonwealth and doing business for profit shall pay a tax to the Commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States."

The controversy relates to the true meaning of the words "upon which income such corporation is required to pay a tax to the United States." Considered solely as matter of statutory construction these words present no difficulty. They do not define net income. No other part of the act defines net income. Ordinarily an income tax act would give such a definition. But this act does not, either in the operative words which have been quoted or in its other provisions, contain any detailed specifications of the subjects of taxation. It simply refers, for a description of what is made liable to taxation, to the laws of the United States. The General Court found at hand already in operation an elaborate system of income taxation for corporations. Instead of multiplying requirements for returns, it adopted for the basis for its tax that system. In selecting the subject for its taxation, the General Court used a carefully phrased, easily ascertained and unambiguous amount of income, namely, the net income upon which the corporation is required to pay a tax to the United States. It did not use the net income as established by any statute or by abstract definition, but only that income actually taxed by the United States and for which the corporation is under obligation to make payment.

The act took effect on May 29, 1918. It is agreed by all parties to these proceedings that when this act took effect such cor-

porations were required to pay to the United States three several taxes upon income or upon profits: one, for convenience designated the income tax, levied under the income tax law of September 8, 1916 (U. S. St. 1916, c. 463; 39 U. S. Sts. at Large, 756) as amended; a second termed the war income tax; and a third called the war excess profits tax, the last two being levied under the war revenue act of October 3, 1917. U. S. St. 1917, c. 63. The income tax law of September 8, 1916, provided in detail for the ascertainment of "the total net income." The war revenue act of October 3, 1917, made no change in this method of ascertainment of "the total net income," but adopted it as the basis upon which the war income tax and the excess war profits tax were to be reckoned.

The form for the corporation income tax return issued by the United States internal revenue department has been presented to us. It is conceded that it shows correctly according to the United States laws in force on May 29, 1918, the method for determining the three several federal taxes to which allusion has been made. It is required by § 1 of the Massachusetts act now to be interpreted that every corporation shall render to the tax commissioner "a true copy of the last return made to the collector of internal revenue of the annual net income . . . and . . . such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of such corporation after making the deductions authorized; . . ."

It is manifest that the Massachusetts act refers to the federal return as a basis for information. It is plain from that return and from an examination of the statutes of the United States, that no corporation on May 29, 1918, was required to pay a tax upon the entire "net income" as defined in acts of Congress and disclosed on the return, except such as were not liable to the war excess profits tax. The federal income tax law of September 8, 1916, as originally enacted provided in § 10 that there should be assessed a tax of two per cent upon the total net income. But that law was not in force as to corporations required to pay the war excess profits tax when the act now before us was passed, because by the act of October 3, 1917, c. 63, § 29, it was provided



"That in assessing income tax the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by act of Congress and assessed for the same calendar or fiscal year." Therefore it is indubitable that a corporation which is liable for a war excess profits tax is not "required to pay a tax to the United States" upon the amount of that war excess profits tax even though as a step toward reaching the final result that amount may be included in the "net income" as shown on the return and as abstractly defined in the acts of Congress. That definition is still applicable under the Massachusetts act to the net income of such corporations as do not pay to the United States any war excess profits tax, because such corporations are required to pay a tax upon the whole of that net income to the United States. But it is not applicable to such corporations as do pay such war excess profits tax, because such excess profits tax is first deducted from the net income before any tax whatever is assessed thereon and required to be paid to the United States. In this connection it is of no consequence that, under U. S. St. 1917, c. 63, § 29, of the act of October 3, 1917, in the computation of the federal income tax and war income tax, the war excess profits tax is deducted from the net income as a credit. The substance of the matter is that that deduction is made before the actual principal upon which the income tax required to be paid to the United States can be determined. The net income upon which the tax is required to be paid to the United States is the amount designated as net income in the form of corporation tax return and in the acts of Congress minus the war excess profits tax. That subtraction must be made before the net income actually subject to the federal tax can be found. The method provided for making the computation is an immaterial incident. Whether that war excess profits tax is counted as a part of the expenses of the business and deducted under that heading from the gross income before the net income is found, or is deducted as a separate item from what is termed net income, is of no consequence. The final sum of income upon which the United States income tax is computed is the essential amount to be found. It is not necessary to review one by one the sections of the acts of Congress which set forth the exemptions and deductions made under different circumstances from the net income as shown by

the internal revenue corporation tax return before computing the several taxes due to the United States, because it rightly is conceded by the Attorney General that, except in cases of corporations not liable for a war excess profits tax and not receiving as income any dividends from other corporations and kindred associations, it is apparent that no one of these taxes is calculated "merely by applying a given rate or schedule of rates directly to the net income. In each instance different items are deducted from that income in assessing the tax."

It is contended in behalf of the Commonwealth that the only net income described in any of the acts of Congress is that ascertained in accordance with § 12 of U. S. St. 1916, c. 463, the act of September 8, 1916, and hence that that net income must bear a tax of one per cent under the Massachusetts act, although no one of the corporations here a party pays a tax to the United States upon that exact sum. That contention cannot be supported. It is contrary to the express words of § 1 whereby only that portion of the net income, upon which the "corporation is required to pay a tax to the United States," is made subject to the State tax. If it had been the purpose of the General Court to adopt a measure of taxation in accordance with that contention, apt words to express that purpose would have been used, as, for example, that the tax should be computed "upon the net income as ascertained under the corporation income tax law of the United States," or "upon the net income used as the basis for the assessment of the income tax of such corporation to the United States," or "upon the net income as determined by the commissioner of internal revenue in accordance with income tax laws of the United States," or other unmistakable language. But instead of stating in direct fashion that simple purpose, the General Court used words which precisely express the very different design of subjecting to the income tax only that portion of the total net income upon which the United States requires the payment of a tax. That design is reiterated thrice in the act, later in § 1 where reference is made to "the total amount of net income taxable under the United States income tax," in § 2 where the words occur "changed or corrected net income upon which the tax is required to be paid to the United States," and in § 3 where provision is made as to corporations doing business outside the

Commonwealth for the apportionment of a portion "of the net income on which the tax is imposed by the United States."

The meaning of the operative words of the statute is plain. The purpose of the act is unequivocal. Its effect is to subject to the income tax there to be assessed only that portion of the net income of a corporation within its terms upon which the United States under its laws actually requires a tax to be paid to it.

It is adjudged in each case that a part of the tax has been illegally exacted, and appropriate decrees are to be entered accordingly.

*So ordered.*

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JOHN C. F. BUTLAND vs. BARNET M. HEIN.

Middlesex. October 15, 26, 1918. — October 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Practice, Civil, Dismissal of case.*

Where upon a record presented to this court it appeared that no question was pending, it was ordered that the case should be dismissed from the docket.

CONTRACT AND TORT as described in the opinion. Writ dated September 27, 1915.

The proceedings in the case are described in the opinion.

S. Sigilman, for the defendant, submitted a brief.

W. A. Lackey, for the plaintiff.

RUGG, C. J. The plaintiff filed what is entitled in this record a "Substitute declaration No. 2," containing two counts in contract and three in tort. The defendant demurred on several grounds, the first being that the declaration set out in different counts different and distinct causes of action, some in tort and others in contract, which were not for the same cause of action. The demurrer was sustained on this first ground. The others were not passed on. Thereafter the plaintiff filed a "Substitute declaration No. 2 as amended after demurrer," by consent of the defendant. No demurrer was filed to this declaration but the defendant answered. There was a trial on this last declaration, and verdict for the plaintiff on two of its counts.

The only semblance for contention that the case is before us is that, after the demurrer to the "Substitute declaration No. 2" had been sustained on the first ground, the defendant filed a paper entitled "Appeal from order overruling demurrer." There had been no order overruling any part of the demurrer. Moreover, the case afterwards went to trial on a later declaration to which there was no demurrer, and in those proceedings there was no appeal. Neither the old declaration nor the old demurrer longer had vitality. There is nothing in this record from which the defendant could appeal. There is nothing pending before us.

*Case dismissed.*

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GLADYS W. EMERY vs. GEORGE G. MILLER.

GLADYS A. KILLAM vs. SAME.

FRANCIS E. EMERY vs. SAME.

WILLIAM H. KILLAM vs. SAME.

Middlesex. October 18, 1918. — October 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, Motor vehicle, Use of highway.*

If a person is driving a motor car at the rate of from thirty-five to forty miles an hour at night on a State highway, of which the travelled part wrought with macadam is sixteen feet wide, when two pedestrians are ahead of him upon this travelled part of the way, which is lighted brilliantly by the headlights of his car and by the searchlight of a street railway car that he just has passed, and runs into the pedestrians, in an action against him for the injuries thus caused it can be found that the rate of speed at which the defendant was driving was excessive and dangerous to travellers and that he was violating St. 1909, c. 534, §§ 14, 16, and was negligent.

If, after the enactment of St. 1914, c. 553, two girls were walking at night slightly at the left of the centre of the travelled macadam part of a State highway, which was sixteen feet wide and had at the left of it the tracks of a street railway, all the rest of the highway, including a dirt sidewalk, being muddy, and when they already were in the glare of the brilliant searchlight of a street railway car, there came behind them a motor car with strong headlights and running at an excessive rate of speed, whereupon the girls started to run and made a dash across the street to the extreme right of the macadam, where they were run into and injured by the motor car, whereas if they had stopped where they were they would not have been struck, in actions against the driver of the car for their injuries thus caused it was *held* that, even if in view of what

happened the girls did not choose the wisest course in the instant permitted them for decision, their conduct was not conclusive against them upon the question of their negligence.

FOUR ACTIONS OF TORT, the first two for personal injuries sustained by the plaintiffs in those actions, who were minors, on the evening of March 20, 1917, on Main Street in the town of Reading by being run into by a motor car alleged to have been driven negligently by the defendant, and the last two actions by the respective fathers of the minors for expenses incurred by reason of their injuries. Writs dated July 20, 1917.

The defendant in his answer in each of the two cases for personal injuries alleged that the plaintiff was not in the exercise of due care and was guilty of negligence which contributed to her injury. In each of the two cases for expenses incurred by reason of the injuries the defendant alleged in his answer that the plaintiff's minor daughter alleged in the declaration to have been injured was not in the exercise of due care and was guilty of negligence which contributed to such injuries.

In the Superior Court the cases were tried together before *J. F. Brown, J.* At the close of the plaintiffs' evidence, which is described in the opinion, the judge ruled that St. 1914, c. 553, did not require him to submit the cases to the jury, and he thereupon ordered a verdict for the defendant in each of the cases. The plaintiffs alleged exceptions.

Sections 14 and 16 of St. 1909, c. 534, "An Act relative to motor vehicles and to the operation thereof," contain the following provisions:

"Section 14. . . . Upon approaching a pedestrian who is upon the travelled part of any way and not upon a sidewalk . . . every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device . . ."

"Section 16. Every person operating a motor vehicle on any way in this Commonwealth shall run it at a rate of speed at no time greater than is reasonable and proper, having regard to traffic and the use of the way and the safety of the public. . . ."

*E. A. Whitman*, for the plaintiffs.

*E. C. Stone*, for the defendant.

*Rugg, C. J.* Two girls about seventeen or eighteen years of age were walking hand in hand slightly to the left of the sixteen

feet wide macadam part of a State highway in the town of Reading at about ten o'clock on a March evening. Other parts of the way including a dirt sidewalk were muddy. From behind, upon tracks on the side of the road, an electric car approached with a searchlight which made brilliant the part of the road where the girls were. They had an indubitable right to be travelling where they were. An automobile with headlights also approached from behind, driven by the defendant at a rate of speed estimated according to some testimony at thirty-five or forty miles an hour. There was an elevation in the road over the brow of which both the electric car and the automobile came, so that when the lights shone down on the road the girls were two or three hundred feet away. In this distance the automobile driven on the right hand side of the macadam passed the electric car, and having been turned slightly further to the right struck both the girls causing severe injuries to each.

There can be no question that there was sufficient evidence of negligence on the part of the defendant. He was violating St. 1909, c. 534, §§ 14, 16. The speed at which he was driving might have been found to have been excessive and dangerous to other travellers.

There was evidence of due care on the part of the plaintiffs. They were upon a part of the highway where they had a right to travel. They rationally might assume that, even though they were on a main thoroughfare, a driver of an automobile would not violate the statutory law or be careless, and they might act to some extent upon that assumption. Neither a pedestrian nor a traveller by automobile has rights superior to those of the other. Each is bound to act with reasonable regard to the presence of the other. The testimony as to the conduct of the plaintiffs was to the effect that as the automobile came over the top of the hill and was distant two hundred or three hundred feet from the plaintiffs, when they were within the full glare both of the searchlight of the electric car and of the headlights of the automobile, "the girls started to run across to the right." "When they started to run, they ran quickly" and made "a dash across the street;" "they must have heard the automobile and they jumped over to their right . . . without stopping to look when they started, they ran right across to their right" and if they had stopped where

they were they would not have been struck and would have been safe. They were hit on the extreme right of the macadam. It cannot be said to be an irrational inference from this testimony that the girls, startled by the combined light of the electric car and the automobile, and having every reason to believe that a position to the right of the macadam part of the way would be safe, and knowing that a very brief time would enable them to run to that place of security, took that course in the instant permitted them for decision. Such a conclusion does not seem as matter of law more wanting in care than to remain on the left of the macadam part of the highway, where they would be within the narrow space between the electric car and the automobile provided the latter kept strictly to the right. If the defendant had been travelling at a lawful rate of speed, the girls would have reached a place of safety. Even if they did not pursue the wisest course in the light of what happened, that is not decisive against them.

*Exceptions sustained.*



JULIA G. SHEEHAN vs. ANNA M. HOLLAND.

Suffolk. October 28, 1918. — October 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence*, Of one controlling real estate, Matter of conjecture, Fall from unexplained cause.

In an action for personal injuries sustained on a winter day by reason of a fall caused by slipping on a step, alleged to have been defective and dangerous, leading to a door of the defendant's house which the plaintiff was invited by the defendant to enter, where there is no evidence that the step was defective in any way and the only evidence bearing on the cause of the injury is the testimony of the plaintiff, "I felt this slipperiness of something. My foot slipped sideways on something," there is nothing to warrant an inference that the defendant was negligent.

TORT for personal injuries sustained on December 28, 1914, by reason of a fall alleged to have been caused by slipping on a defective and dangerous step leading to a door of the defendant's house in Concord which the plaintiff was invited by the defendant to enter, when the plaintiff had come at the defendant's request

to do some dressmaking for the defendant. Writ dated October 15, 1915.

In the Superior Court the case was tried before *Hitchcock, J.* At the close of the plaintiff's evidence, consisting merely of her own testimony, which is described in the opinion, the judge, on motion of the defendant, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

*W. A. Gaston, F. E. Snow & R. M. Saltonstall*, for the plaintiff.

*H. N. Berry & C. C. Bucknam*, for the defendant.

BY THE COURT. The plaintiff slipped as she was going on a December day at the invitation of the defendant up the steps to a door of the defendant's house. The only testimony bearing upon the cause of the injury was that of the plaintiff to the effect that as she fell "I felt this slipperiness of something. My foot slipped sideways on something." There is no evidence in the record to show that the steps were defective in any respect. There is nothing whatever to warrant an inference that the defendant was negligent. *Norton v. Hudner*, 213 Mass. 257. *Zugbie v. J. R. Whipple Co.* 230 Mass. 19. *Jameson v. Boston Elevated Railway*, 193 Mass. 560, 562.

*Exceptions overruled.*

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FRANK H. WALTERS vs. JACKSON AND NEWTON COMPANY.

Middlesex. October 29, 1918. — October 31, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Practice, Civil, Report.*

By R. L. c. 173, § 108, as amended by St. 1912, c. 317, the power of a judge of the Superior Court, after the death of another judge of that court who had presided at a trial, to report the case thus tried for determination by this court, is confined expressly to cases where the trial judge had reserved the case for report and failed by reason of his death to make such report; and, in a case where there was no request to the trial judge to report the case and no decision by him to make a report, another judge has no power to report the case after his death.

TORT. Writ dated June 5, 1916.

The case was tried before *Hardy, J.*, on December 15, 1916. At the close of the plaintiff's evidence the judge ordered a verdict for



the defendant, and the plaintiff filed a bill of exceptions, but there never was a hearing upon it. The time for the allowance of the exceptions was extended from time to time by agreement and the last extension expired on December 3, 1917, which was after the death of *Hardy, J.*, "and through inadvertence of counsel the time was not extended before said expiration."

On December 18, 1917, the plaintiff filed in the Superior Court a motion that the case might be assigned to a judge of that court to be reported by him on an agreed statement of facts for determination by this court.

The motion was heard by *J. F. Brown, J.*, who "ruled that under the law a justice of the Superior Court had no authority to allow such a motion." The judge denied the motion; and the plaintiff alleged exceptions.

The case was submitted on briefs.

*E. C. Stone*, for the plaintiff.

*H. R. Bygrave*, for the defendant.

RUGG, C. J. Exceptions were duly saved at the trial of this case. The time for the allowance of exceptions as extended expired on December 3, 1917. The judge before whom the case was tried had then deceased. Through inadvertence of counsel no request was made seasonably for further extension of the time for allowing exceptions. There had been no request to the trial judge to report the case to this court and no determination by him to make a report.

Under these circumstances there is no jurisdiction in another judge to make a report even if such course seems wise. The power of a judge of the Superior Court to report questions of law for the determination of this court is wholly the creature of statute. *Riverbank Improvement Co. v. Chapman*, 224 Mass. 424, 425, and cases there collected. No power to report was conferred by R. L. c. 173, §§ 105, 108, as amended by St. 1912, c. 317, upon any judge other than the one who heard the parties or presided over the trial. *Newburyport Institution for Savings v. Coffin*, 189 Mass. 74. No statute since has been enacted conferring such power in a case like the present. St. 1908, c. 177, manifestly is confined to instances where the bill of exceptions has been disallowed because not conformable to the truth or not stating the facts and evidence correctly and fully.

St. 1912, c. 317, amending R. L. c. 173, § 108, covers the subject. But the power of another judge to report there is confined expressly to cases where the judge who presided at the trial "has reserved a case for report to the Supreme Judicial Court . . . and fails, by reason of . . . death . . . , to make such report." These words plainly imply that the determination to make such report rests entirely with the judge who knew the facts by reason of having presided over the trial. It is only an intention, fully formed by him and failing of execution because of death, which can be perfected by another judge. That is a condition precedent to the exercise of the power by another judge. See *Lee v. Blodget*, 214 Mass. 374, 378.

*Exceptions overruled.*

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FRANK W. CROCKER & others, trustees, vs. CITY OF LOWELL.

Middlesex. November 13, 1918. — November 14, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Practice, Civil, Findings of judge.*

Where a case is tried before a judge without a jury, a finding of fact by the judge warranted by the evidence is final.

CONTRACT by the trustees under the will of Edwin C. Swift, late of Beverly, against the city of Lowell, for the sum of \$9,540 paid under protest by the plaintiffs as a tax and alleged to have been assessed illegally because no trustee or beneficiary of the trust resided in Lowell. Writ dated November 13, 1916.

In the Superior Court the case was tried before *Chase, J.*, without a jury. The question at issue and the essential evidence are stated or described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to rule that upon all the evidence the finding should be for the defendant. The judge denied the motion. The defendant then asked the judge to make, among others, the following findings:

"3. The plaintiff Bailey's domicile in 1916 was in the city of Lowell and he was properly taxed by the board of assessors.

"4. The plaintiff Bailey's domicil on April 1, 1916, was in the city of Lowell."

The judge refused to make either of these findings, and found for the plaintiffs in the sum of \$9,897.75. The defendant alleged exceptions.

*W. D. Regan*, for the defendant.

*F. Hutchinson & P. B. Smith*, for the plaintiffs, were not called upon.

BY THE COURT. The only question involved in this case was whether one of the plaintiffs, named Bailey, was domiciled in Lowell or in Greenfield in the State of New Hampshire in 1916. Bailey testified to facts which showed that his domicil was in Greenfield. It is manifest from the general finding in favor of the plaintiffs that the judge believed this testimony. The credibility of this evidence was wholly for the determination of the trial judge. Therefore there was no error of law in the refusal to make the findings requested by the defendant.

*Exceptions overruled.*



ANNA C. PHILLIPS vs. JAMES N. GOOKIN.

Middlesex. November 14, 1918. — November 14, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Practice, Civil, Verdict. Evidence, Presumptions and burden of proof. Negligence. Motor Vehicle.*

Mere disbelief of testimony is not the equivalent of evidence to the contrary.

In an action for personal injuries sustained by being struck by a motor car of the defendant, proof that the defendant owned the car, without any evidence that he was in control of it or that the person driving it was his servant, does not entitle the plaintiff to go to the jury.

TORT for personal injuries sustained by the plaintiff, a woman seventy years of age, by reason of being struck by a motor car of the defendant, alleged to have been driven negligently by a servant of the defendant, on Columbus Avenue near Holyoke Street in Boston at about half past ten o'clock on the evening of September 10, 1915. Writ dated September 17, 1915.

In the Superior Court the case was tried before *Hitchcock*, J. The evidence is described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to order a verdict for the defendant. The judge denied the motion. The defendant also asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury with special questions, which with the answers of the jury were as follows:

"1. Was the defendant Gookin operating the automobile at the time when the accident occurred?" The jury answered, "No."

"2. Was Hayden employed by the defendant Gookin to operate the automobile and was he, if so employed, operating it within the scope of his employment at the time when the accident occurred?" The jury answered, "Yes."

"3. Was the automobile being operated in a careless and negligent manner at the time when the accident occurred?" The jury answered, "Yes."

"4. If the plaintiff is entitled to recover damages from the defendant, what is the amount thereof?" The jury answered, "\$300."

The jury returned a general verdict for the plaintiff in the sum of \$300; and the defendant alleged exceptions.

*T. J. Shea*, for the defendant.

*I. H. Fox*, for the plaintiff.

BY THE COURT. This is an action to recover compensation for personal injuries received by the plaintiff from being struck by an automobile. The testimony in the case was to the effect that the defendant, being the owner, had let the use of the automobile to one Hayden, who was driving and who was not then and never had been a servant of the defendant. If this testimony was believed, the defendant was not answerable for the wrong of the driver, *Herlihy v. Smith*, 116 Mass. 265; if disbelieved, there was nothing to fasten liability on the defendant. Mere disbelief of testimony is not the equivalent of evidence to the contrary. *Wakefield v. American Surety Co. of New York*, 209 Mass. 173, 177.

If this testimony was discredited, the only relevant fact left is that the defendant owned the automobile. That alone is not sufficient in this Commonwealth (however it may be elsewhere, see *Potts v. Pardee*, 220 N. Y. 431, 433) to warrant a verdict against

the defendant. *Trombley v. Stevens-Duryea Co.* 206 Mass. 516, 519. *Hartnett v. Gryzmish*, 218 Mass. 258, 262. *Marsal v. Hickey*, 225 Mass. 170. *Melchionda v. American Locomotive Co.* 229 Mass. 202. The record is bare of anything to show that the defendant was on the machine at the time of the accident. The testimony that some unidentified person was with Hayden, although contradicted by the latter, had no tendency to show responsibility on the part of the defendant.

The motion of the defendant that a verdict be directed in his favor should have been granted. In accordance with St. 1909, c. 236, judgment may be entered for the defendant.

*So ordered.*

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J. WILLIAM FLOOD & others vs. LEWIS A. HODGES & another.

Bristol. October 28, 1918. — November 19, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Municipal Corporations*, Municipal indebtedness act, Budget. *Statute*, Construction. *Words*, "Any purpose."

Under the provisions of the municipal indebtedness act which relate to an annual budget of current expenses in cities other than Boston governed by a mayor and a city council, contained in St. 1913, c. 719, § 20, and providing that the city council, "without the approval of the mayor, shall not increase any item in nor the total of a budget, nor add any item thereto," orders and ordinances, adopted by the city council of such a city without the approval of the mayor, purporting to increase the compensation of firemen and policemen beyond the amounts provided for by the budget, are void.

In the provision, contained in the statute named above, that, "In case of the failure of the mayor to transmit in writing to the city council a recommendation for an appropriation of money for any purpose deemed by the council to be necessary, and after having been so requested by vote of the city council, said council, after the expiration of seven days after such vote, upon its own initiative, may make an appropriation for such purpose by a vote of at least two thirds of its members," the words "any purpose" mean any purpose other than those already included in the annual and supplementary budgets submitted by the mayor.

The unequivocal limitation placed by the statute upon the power of initiative by the city council of such a city in making appropriations is not to be defeated by a vote requesting action by the mayor or by an amendment to ordinances establishing such expenditures or by the enactment of an ordi-

nance attempting to deprive the mayor of his prerogative under such a city charter of approving drafts or warrants before money can be withdrawn from the city treasury.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on September 4, 1918, by the mayor and more than ten taxable inhabitants of the city of Taunton under R. L. c. 25, § 100, to restrain the city auditor from approving and the city treasurer from paying to employees of the fire department and of the police department an increased compensation which purported to be authorized by certain orders and ordinances of that city passed by the city council without the approval of the mayor and alleged to be void.

The case was heard by *Carroll, J.* The facts that appeared in evidence are stated in the opinion. The single justice ruled that the order of the city council purporting to make an appropriation for payment of extra compensation to members of the police and fire departments, which was passed on July 16, 1918, as described in the bill, was unlawful and void.

He found that, although the other appropriations which had been made lawfully for the police and fire departments of the city of Taunton had not been entirely spent at the dates when the city council passed the order and ordinances described in the bill, by which they attempted to increase the compensation of policemen and permanent firemen, such appropriations were sufficient only for the payment of the wages of such employees at the rates which were in force before such orders and ordinances were passed, and were not sufficient to pay any of the increases therein contained, and he ruled that the city council had no authority to make the increases in compensation of policemen and permanent firemen which they attempted to make by the order passed on May 14, 1918, described in the bill and by the ordinances passed on July 23, 1918, also described in the bill.

He also found that certain other ordinances described in the bill were unreasonable in so far as they required payment of the moneys of the city of Taunton by the treasurer on warrants not signed by the mayor, and ruled that the amendments to the ordinances of the city of Taunton described in that part of the bill were void.

The single justice ordered permanent injunctions to issue as prayed for in the bill, and reported the case for determination by the full court.

The provisions relating to an annual budget of current expenses in cities other than Boston governed by a mayor and a city council, contained in § 20 of St. 1913, c. 719, called the municipal indebtedness act, are as follows:

"Section 20. Within sixty days after the annual organization of the city government, the mayor of every city, except Boston and those cities having the commission form of government, so called, shall submit to the city council the annual budget of the current expenses of the city, and the mayor may submit thereafter supplementary budgets until such time as the tax rate for the year shall be fixed. The budget shall consist of an itemized and detailed statement of the money required, and the city council shall make such appropriations in detail, clearly specifying the amount to be expended for each particular purpose. The city council may reduce or reject any item, but, without the approval of the mayor, shall not increase any item in nor the total of a budget, nor add any item thereto. It shall be the duty of the city officials, when so requested by the mayor, to submit to him forthwith in such detail as he may require estimates for the next fiscal year of the expenditures of their departments or offices under their charge, which estimate shall be transmitted to the city council. In case of the failure of the mayor to transmit in writing to the city council a recommendation for an appropriation of money for any purpose deemed by the council to be necessary, and after having been so requested by vote of the city council, said council, after the expiration of seven days after such vote, upon its own initiative, may make an appropriation for such purpose by a vote of at least two thirds of its members, and shall in all cases make such appropriations in detail, clearly specifying the amount to be expended for each particular purpose; . . . In the period after the expiration of any fiscal year and before the regular appropriations have been made by the city council, liabilities may be incurred and expenditures made payable out of the regular appropriations to an amount not exceeding in any month sums spent for similar purposes during any one month of the preceding year, or may expend in any one month for any

officer or board created by law an amount not exceeding one twelfth of the estimated cost for that year, but all interest and debt falling due in said period shall be paid."

*H. LeB. Sampson*, for the plaintiffs.

*A. Fuller*, (*R. P. Coughlin & W. A. Swift* with him,) for the defendants.

RUGG, C. J. This is a bill in equity brought by the mayor and more than ten taxable inhabitants of the city of Taunton to restrain the city auditor and the city treasurer from paying certain increases in the compensation of firemen and policemen. The main question is whether an order for such increases, with appropriations therefor and ordinances to the same effect, all adopted by the city council without the approval of the mayor, are binding on the city. The answer depends on the meaning of § 20 of St. 1913, c. 719, commonly called the municipal indebtedness act.

The powers of municipal government in Taunton concerned in this controversy are vested in the mayor and a city council of nine members.

The mayor, in accordance with said § 20, submitted his annual budget for the year ending November 30, 1918, which was adopted by the municipal council and approved by him in April, 1918. The budget, as submitted, adopted and approved, contained a general appropriation of \$60,000 for the police department and \$62,000 for the fire department. These appropriations, although not spent when the subsequent order and ordinances here in issue were passed, were sufficient only for the payment of wages of the policemen and firemen at the rates previously in force, and were not large enough to meet the increases contemplated. In June, 1918, the municipal council passed an order requesting the mayor to transmit in writing a recommendation for an appropriation for purposes deemed by it necessary, namely, for increases in the wages of the policemen and firemen. The mayor having failed for more than seven days to transmit such recommendation, the council, by vote of at least two thirds of its members, adopted an order appropriating money for that purpose, which was not presented to the mayor for his approval. Then the council passed, notwithstanding a veto by the mayor, three ordinances making a corresponding increase in the pay of the policemen and firemen.



The mayor declining to approve payrolls at the increased compensation, the council thereupon passed two ordinances, despite a veto by the mayor, the effect of which was to require the city auditor to draw warrants for payrolls and bills against the city and the city treasurer to make payment thereof without approval by the mayor.

These orders, appropriations and ordinances were void because contrary to the provisions of the municipal indebtedness act. That act was an innovation in the administration of the financial affairs of cities governed by a mayor and a city council. It is an act of broad application, and all provisions of general and special laws inconsistent therewith, save in respects not here material, are repealed. § 22. The manifest purpose of the framers of the act was to set rigid barriers against expenditures in excess of appropriations, to prevent the borrowing of money for current expenses, to confine the making of long time loans strictly to raising money for permanent improvements, and in general to put cities upon a sound financial basis so far as these ends can be achieved by legislation. The budget system was one of the means adopted. The responsibility for framing and presenting the budget is placed on the mayor. He is required, within a brief time after the annual organization of the city government, "to submit to the city council the annual budget of the current expenses of the city." The budget consists of an itemized and detailed statement of the money required to meet all the current expenses of the city for the year, with clear specifications of the amounts to be expended for each particular purpose. The preparation of a budget of necessity implies a comprehensive survey of all the needs for expenditures for the ordinary municipal operations and an intelligent and discriminating calculation of necessary charges. That is made an executive function. The power of the mayor in this direction, even by way of supplementary budgets, comes to an end when the tax rate has been fixed for the year. The legislative power of the municipal council respecting the budget is not unbounded, but is strictly limited to the reduction or rejection of any item, and it is prohibited from increasing any item in or the total of the budget and from adding any item without the approval of the mayor. The manifest design of these provisions is to provide early in the municipal year a complete schedule

of appropriations for the general uses of the city and to discourage a tendency to spend more than the municipal income. Then follows the only provision permitting the municipal council to take the first step in making appropriations, as follows: "In case of the failure of the mayor to transmit in writing to the city council a recommendation for an appropriation of money for any purpose deemed by the council to be necessary, and after having been so requested by vote of the city council, said council, after the expiration of seven days after such vote, upon its own initiative, may make an appropriation for such purpose by a vote of at least two thirds of its members." These words cannot in reason be construed as permitting the city council at any time of its own volition to supplement and increase the items already included in the annual budget as adopted. Such an interpretation would be incompatible with the preceding provisions whereby the power of the council to deal with the budget is restrained within narrow confines. It would be an idle form to prohibit the council from increasing any single item or otherwise in any way adding to the aggregate of appropriations recommended by the mayor, and at the same time allow the council to raise any one or all of these items and to add new items through the simple device of a request to the mayor to transmit a recommendation to that end, and, in the event of his refusal, to make unlimited appropriations covering the same subject. Such utter absence of effective restraint cannot be presumed to have been the intent of the General Court. A legislative act ought to be interpreted, whenever permitted by its words, so as to make it effective toward a substantial end and not devoid of vitality. Barrenness of accomplishment cannot be imputed to the legislative department of government. The context shows that the words "any purpose," in the sentence last quoted from the act, mean and can only mean an object other than those already included in the annual and supplementary budgets submitted by the mayor.

This unequivocal limitation placed by the statute upon the power of initiative by the council in making appropriations cannot be circumvented by the agency either of a vote requesting action by the mayor, or of an amendment to ordinances establishing such expenditures, or by the enactment of an ordinance attempting to deprive the mayor of one of the essential prerogatives of

the chief executive, under such a city charter as that of Taunton, of approving drafts or warrants before money can be withdrawn from the city treasury. All these contrivances are equally futile to frustrate the clearly dominant purpose of the statute. These votes and ordinances of the municipal council apparently all were parts of a single scheme directed toward the sole end of attempting to increase the pay of the policemen and firemen in a way not authorized by the statute, and therefore they all fall together. The findings of the single justice and his order for permanent injunctions were right.

*Decree accordingly.*

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WILLIAM J. O'NEILL vs. ANNIE E. O'NEILL, executrix.

Plymouth. November 20, 1918. — November 21, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Probate Court, Appeal.*

An order of a single justice of this court denying a petition for leave to enter late an appeal from a decree of the Probate Court on the grounds that the petition was not filed within the time allowed by R. L. c. 162, § 14, and that, if it had been, the petitioner had not brought himself within the requirements of § 13 cannot be reviewed on appeal in the absence of any report of the evidence.

PETITION for leave to enter late an appeal from a decree made on December 11, 1916, by the Probate Court for the county of Plymouth allowing the will of Denis O'Neill.

The executrix of the will of Denis O'Neill filed a motion to dismiss the petition for the reason that it was not filed within one year after the passing of the decree complained of.

The matter was heard by *De Courcy, J.*, who made an order denying the petition with a memorandum as follows:

"The petition for leave to enter the appeal late is denied. It was not filed within the time allowed by R. L. c. 162, § 14; and, even if the statute did not expressly limit the time for filing this petition, the petitioner has not brought himself within the requirements of § 13. This renders unnecessary any action on the motion of the executrix to dismiss." The petitioner appealed.

The case was submitted on briefs.

*D. Flower*, for the petitioner.

*W. J. Coughlan & D. R. Coughlan*, for the respondent.

BY THE COURT. This is a petition for leave to enter late an appeal from a decree of the Probate Court under R. L. c. 162, §§ 13, 14. The probate decree is alleged to have been entered on December 11, 1916. The record does not show when this petition was filed. See *O'Neill v. O'Neill*, 229 Mass. 508. No evidence is reported. There is no reason to doubt the correctness of the findings of the single justice that the petition was not filed within the time allowed by § 14 of the statute, and that the petitioner has not brought himself within the provisions of § 13. These were pure questions of fact, which cannot be reviewed in the absence of a report of the evidence. There is no support whatever in the record for the contention of the petitioner that the case was not before the single justice for a hearing on its merits.

*Decree denying petition affirmed.*

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### DENNIS C. MCCARTHY'S (dependent's) CASE.

Suffolk. November 20, 1918. — November 22, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Workmen's Compensation Act. Proximate Cause.*

- A finding of the Industrial Accident Board, that the death of an employee from acute military tuberculosis did not result from abrasions on his leg and foot received four months and a half earlier in the course of and arising out of his employment, is a finding of fact which will not be disturbed, if warranted by the evidence, as it was in the present case.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board refusing to award compensation to Ellen McCarthy, the dependent widow of Dennis C. McCarthy, late of Boston, who was employed as a helper on a wagon of Rueter and Company, Incorporated, for the death of the employee from tuberculosis on February 2, 1915, alleged to have

resulted from an injury received by him on September 14, 1914, which aggravated and accelerated the disease.

The case was heard by *McLaughlin*, J. It appeared by the report of the Industrial Accident Board that the arbitration committee found, "Upon all the evidence, that the personal injury received by the employee on September 14, 1914, had no causal relation to his death by reason of a condition of acute miliary tuberculosis on February 2, 1915, and therefore dismissed the claim for compensation filed by his widow." At the hearing before the Industrial Accident Board no new evidence was introduced, the case being considered by the board upon the facts reported by the arbitration committee. The character of that evidence is described in the opinion. The board, having reviewed the evidence as reported to them, affirmed and adopted the findings and decision of the arbitration committee.

The judge made a decree in accordance with the decision of the Industrial Accident Board; and the dependent widow appealed.

The case was submitted on briefs.

*B. J. Killion & C. Toye*, for the dependent widow.

*J. W. Cronin & F. A. Carroll*, for the insurer.

BY THE COURT. It has been decided repeatedly that the decisions of the Industrial Accident Board upon questions of fact stand upon the same footing as the verdict of a jury or the finding of a judge and are not subject to review. The only question in that connection is whether there is any evidence to support the decision. *Pigeon's Case*, 216 Mass. 51. *Moran's Case*, 230 Mass. 500. *Knight's Case*, ante, 142.

The crucial question in the case at bar was, whether any causal connection was shown between the disease known as acute miliary tuberculosis, which resulted fatally to the employee on February 2, 1915, and the abrasions on his leg and foot, received in the course of and arising out of his employment on the fourteenth of the preceding September. The record shows that while there was some testimony tending to show that there was such connection, there was other testimony tending to show that there was no such connection. Its weight and credibility were for the Industrial Accident Board. The decision of the board in favor of the insurer has ample support in the evidence and cannot be set aside.

*Decree affirmed.*

## STANISLAW DEMBINSKI'S (dependents') CASE.

Worcester. September 30, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; CARROLL, JJ.

*Workmen's Compensation Act, Dependency.*

In a claim under the workmen's compensation act by a partially dependent parent for the death of a minor child employed by a subscriber under the act which resulted from an injury arising out of and in the course of the child's employment, the measures of compensation under St. 1911, c. 751, Part II, §§ 6, 7, as amended by St. 1914, c. 708, §§ 2, 3 (c), are the "average weekly wages" of the employee and "the amount contributed by the employee" to the partially dependent parent out of such weekly wages, and no deduction is to be made for expenses incurred by the parent on account of the child.

In claims under the workmen's compensation act by the father and the mother of a minor son, alleged to have been partially dependent upon his wages for support, for his death which resulted from an injury arising out of and in the course of his employment, it appeared that the employee was about sixteen years of age and lived with his father, who was the head of the family, consisting of his wife, the employee and other children, that the wife "was the treasurer in the home and all the members of the family turned over their money to her," that the employee paid over his wages to his mother and, if she was not at home, would turn over the money to his father who afterwards would hand it to his mother, and that, when the employee wanted clothes, he went to his mother and either she or his father would go with him to buy them. *Held*, that the natural inference from this evidence was that the whole of the contribution of the employee was for the benefit of his father, who legally was entitled to the wages of his minor son and upon whom as the head of the family rested the legal obligation to support his wife and children, that the father did not relinquish his right to the wages of the employee by turning them over to his wife as his agent in managing the finances of the family, and that accordingly the entire award should be made to the father.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board ordering the insurer to pay to Joseph Dembinski and Anna Dembinski, his wife, as the partially dependent parents of Stanislaw Dembinski, a minor, whose death on April 12, 1917, resulted from an injury arising from and in the course of his employment, "a weekly compensation of \$6.60 to be paid in equal shares to Joseph and Anna Dembinski for a period of five hundred weeks from April 12, 1917."

The case was heard by *Aiken*, C. J. The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

*C. C. Milton*, for the insurer.

*C. Haggerty*, for the dependents, submitted the case without argument or brief.

RUGG, C. J. The deceased employee met his death as the result of injury arising out of and in the course of his employment by a subscriber under the workmen's compensation act. He was about sixteen years of age and lived at the home of his father, who was the head of his family consisting of his wife, the mother of the deceased, and other children. The single member of the Industrial Accident Board and the full board on review found that the actual cash contribution turned over each week to the father and mother by the deceased was \$9.89, and that partial dependency of each parent existed to the extent of one half that sum.

It is argued that the amount found to have been contributed by the deceased should be reduced by the sum of \$100, which was spent each year by the mother for the purchase of such clothes as the deceased wanted, and which were necessary for him. This contention is not sound. In deciding the question whether a parent is wholly or partially dependent upon the wages of a deceased child, the expenses incurred by the parent on account of the child on the one side are to be weighed against the benefits, including wages, received by the parent from the labor of the child on the other side. All the circumstances are to be considered in reaching a conclusion whether there is dependency in whole or in part. To quote the words of § 7 of Part II of the act (St. 1911, c. 751) as amended by St. 1914, c. 708, § 3 (c), "In all other cases," that is to say, in all cases except those where the act by its terms fixes conclusive presumptions as to dependency, "questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury." All pertinent elements must be regarded in ascertaining what that fact is. But when the fact of dependency in whole or in part has been established and it becomes necessary to determine the amount of compensation to be paid, then resort must be had to § 6 of the act, as amended by St. 1914, c. 708, § 2, and its

terms followed. That section contains no reference to any other standard in cases of partial dependency than the "average weekly wages" and "the amount contributed by the employee" out of such weekly wages. It makes no reference to expenses incurred by the parent on account of the child and authorizes no deductions on that account. That such expenses are not to be regarded in this connection was decided in *Murphy's Case*, 218 Mass. 278, and *Gove's Case*, 223 Mass. 187. These provisions of the act are important in cases where the deceased is a minor child and the claimant a parent under obligation to support. There is nothing in the present record to show that the deceased had ever been emancipated or that the ordinary legal relation between a father and minor son earning wages did not exist. Under such circumstances the father was entitled to the wages of the son and was obliged to furnish him reasonable support, including board and clothes. *Tornroos v. Autocar Co.* 220 Mass. 336, 341. There are no controlling facts to show that either parent acted as banker for the child by keeping the wages of the latter for his use. The record indicates rather that the parent exercised the common law right of receiving and using as his own the earnings of his minor child. That being so, the amount spent by the parent, presumably from his own funds, for clothing of the deceased son, is not to be deducted. In *Gove's Case*, where expenditures for "clothing, tuition and incidentals" were deducted from the wages in order to ascertain the amount contributed to the dependent parent, the deceased employee was a son who had reached his majority, and who therefore was responsible for his own clothing. That case is quite distinguishable from the present on this point.

The insurer contends that the finding of the board, to the effect that the father and mother were each partially dependent in equal degree upon the wages of the deceased, is not warranted by the evidence. This point is open on the appeal, although no request was made respecting it, because both the single member in his report and the board on appeal state that one of the questions to be decided is whether the claimants were dependent upon the earnings of the deceased employee. That shows that the point now urged was considered and passed upon at the hearings on the facts. The testimony of the father was that the deceased sometimes "would turn his money over to his father and some-



times to his mother, whoever happened to be at home. . . . If the boy needed a suit he would ask his mother to get it for him and she would do so." The mother testified that the deceased "handed her his pay envelope every Friday unopened. She was the treasurer in the home and all the members of the family turned over their money to her. If she was not at home Stanislaw would turn over his money to his father but the money was finally turned over to her. . . . When he wanted clothes : . . she would go down town with him and buy what he wanted." A sister of the deceased testified that "Stanislaw turned over all the money he earned to her mother. . . . Whenever Stanislaw wanted clothes he went to her mother and either the latter or her father went with him to buy them." The natural inference from this evidence seems to us to be that the whole contribution was for the benefit of the father, upon whom as head of the family rested the entire legal obligation to support his wife and children, and who as father was entitled as matter of law to all the wages of the deceased, his minor son. If he chose to have the wages of his minor son as well as of himself turned over to the wife as his agent in managing the finances of the family, that did not diminish his right to the wages of his minor son or his obligation to support his family, or his ultimate dependence upon those wages in performing his obligation as the head of the family to support its members. That obligation rested wholly upon him. He had not undertaken to shift the burden upon his wife in any degree. He had not abandoned his obligation in this regard, but was discharging his full duty. The real benefit arising from the earnings of the son was his. The entire award should be made to the father. *Pagnoni's Case*, 230 Mass. 9. The decree in the opinion of a majority of the court is to be modified accordingly, and as thus modified is affirmed.

*So ordered.*

## COMMONWEALTH vs. DAVID WAGNER.

Hampden. October 9, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Evidence, Dying declarations, Opinion: experts. Abortion.*

At the trial of an indictment under R. L. c. 212, § 15, for unlawfully attempting by the use of a certain instrument to procure the miscarriage of a certain woman, in consequence of which she died, the dying declarations of the woman, made when she fully realized that she had no hope of recovery, contained in the form of answers to questions in a paper subscribed and sworn to by her before a justice of the peace, who testifies to having taken down the answers as nearly as he could in writing long hand, are admissible in evidence, and the presiding judge properly may allow the contents of the paper to be read to the jury.

The statements of the woman contained in such a paper, which describe her purpose in seeking medical advice and assistance from the defendant and her conversations with him, are competent evidence, to which the declarant could have testified as a witness, if living.

At the trial of such an indictment the medical examiner who performed the autopsy on the body of the woman, and whose qualification as an expert is unquestioned, properly may be allowed to testify as to what in his opinion was the cause of her death.

INDICTMENT, found and returned in the Superior Court in the county of Hampden in May, 1917, under R. L. c. 212, § 15, charging that the defendant at Springfield on March 23, 1917, "with intent to procure the miscarriage of Nellie Ostrom did unlawfully use a certain instrument upon the body of said Nellie Ostrom, and, in consequence thereof, said Nellie Ostrom died."

The defendant was tried before *Hamilton, J.* The exceptions to the admission of evidence are described in the opinion. At the close of the evidence the defendant made the following motion: "That the case be taken from the consideration of the jury upon the grounds that upon all the evidence the dying declarations of the deceased were not admissible, and in the absence of these dying declarations there is not sufficient evidence for the jury to consider as to the defendant's guilt under the indictment; and upon the further reason that the written statement of said dying declarations should not have been read to the jury, but if used at all should have been used only by the witness to refresh his

recollection, as that statement does not contain all the questions of the witness and all the declarations of the deceased.

"Upon all the evidence the Commonwealth is not entitled to maintain its indictment against the defendant."

The justice of the peace, who took down in writing the statement of the dying declarations, testified at the trial that the questions were as he asked them and that the replies of the woman were as near as he "could get them in writing long hand," except the wording of the statement at the end as to the knowledge by the declarant of her impending death.

The judge denied the motion and "gave appropriate instructions to the jury to which no exception was taken." The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs.

*C. L. Young & W. G. McKechnie*, for the defendant.

*J. B. Ely*, District Attorney, for the Commonwealth.

BRALEY, J. The defendant, who has been indicted, tried and convicted under R. L. c. 212, § 15, of the crime of unlawfully attempting by the use of a certain instrument to procure a miscarriage of one Nellie Ostrom, in consequence of which she died, contends, that his exceptions to the admission of evidence, and to the refusal to direct a verdict in his favor, show reversible error entitling him to a new trial.

The Commonwealth having offered in evidence a paper subscribed and sworn to by her before a justice of the peace, purporting to be her declarations concerning the material acts and conduct of the defendant, the question is whether the preliminary findings of the judge, that "the deceased believed that her end was near and that she had no chance of recovery and that she had no hope of recovery" were within his province and were warranted. The undisputed evidence of the attending physician and of the magistrate, which was properly admitted, furnishes ample proof that she fully realized that recovery was impossible and that she must die. It was under these conditions that the questions were asked and answered. The paper, although not a deposition, having been primary evidence of her declarations, the judge in unexceptionable language rightly permitted it to be read to the jury, to whom in accordance with our rules of criminal procedure the question of its admissibility was ultimately left under appropriate

instructions to which no exceptions were taken. *Commonwealth v. Haney*, 127 Mass. 455. *Commonwealth v. Turner*, 224 Mass. 229, 235. The defendant however further urges, that the statements therein descriptive of her purpose in seeking medical advice or assistance, and of conversations with him, should have been excluded. But, if death had not ensued, the declarant as a witness could have testified concerning her pregnancy and her relations with the defendant as her medical adviser, and such testimony is none the less competent, because it is presented in the form of declarations made under a sense of impending death occurring within twenty-four hours thereafter. *Commonwealth v. Wood*, 11 Gray, 85. *State v. Glass*, 5 Ore. 73. *State v. Howard*, 32 Vt. 380. *Mattox v. United States*, 146 U. S. 140.

The evidence of the medical examiner, whose professional qualifications were unquestioned and who performed the autopsy, that the cause of death was "septic abortion" as well as his answer in the negative to the question whether the subsequent operation of curetting performed at the hospital was sufficient to have caused the infection or septic condition, was plainly competent. The record shows that by the words "septic abortion" he did not mean that a criminal abortion had been performed, but meant only that a miscarriage had been caused producing symptoms which were not attributable to the curetting. *Commonwealth v. Thompson*, 159 Mass. 56, 58.

The question of the defendant's guilt or innocence was for the jury, and the exceptions must be overruled.

*So ordered.*

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ROBERT H. SPARE vs. CITY OF SPRINGFIELD.

Hampden. October 14, 1918. — November 25, 1918.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Eminent Domain. Parks and Park Commissioners. Equity Jurisdiction, To remove cloud from title.*

Application of the principle that the taking of property by right of eminent domain is an act *strictissimi juris* and is valid only when the statutory requirements are performed with exactness.

Under R. L. c. 28, § 2, which provides that no land shall be taken by a board of park commissioners for a public park until an appropriation sufficient for the estimated expense thereof shall have been made in the manner provided in the statute, a taking of land by the park commission of a city before such an appropriation has been made, followed by an appropriation made by the city council in the manner required by the statute, is void and is not made valid by the subsequent action of the city council. Following *Lajoie v. Lowell*, 214 Mass. 8.

An attempted taking of land under the right of eminent domain which is void for lack of jurisdiction affords ground for maintaining a suit in equity by the owner of the land to remove the cloud from his title.

BILL IN EQUITY, filed in the Superior Court on August 30, 1911, and amended on June 14, 1916, by the owner of certain land in Springfield bordering upon the Connecticut River against the city of Springfield, to remove a cloud upon the plaintiff's title by declaring to be void an alleged taking of the plaintiff's land by the defendant's board of park commissioners.

The case was referred to a master, who filed a report containing certain findings of fact, including the material fact stated in the opinion. He refused to make certain rulings of law requested by the plaintiff, for the reason that it was not within his province to make such rulings. The plaintiff excepted to the master's report on the ground of his refusal to make such rulings. The rulings of law which the master refused to make as beyond his province included rulings, that the alleged taking did not comply with the provisions of R. L. c. 28, § 2, and that the taking as made was illegal and void.

The case was heard by *Callahan, J.*, upon the plaintiff's exceptions to the master's report and on the defendant's motion that the report of the master be confirmed. The judge made an interlocutory decree ordering that the plaintiff's exceptions be overruled and that the report be confirmed. He made a memorandum of decision as follows:

"I find and rule that the taking was illegal and void. The plaintiff is entitled to a decree enjoining the defendant, its boards, commissions and all other agents and servants, from making or setting up any claim of right to or in the land in controversy by reason of the attempted taking, or exercising any dominion over the land, or interfering in any way with the plaintiff's use or enjoyment of the same; and ordering the defendant to execute

to the plaintiff a quitclaim deed of all right, title or interest in and to it which it ever claimed to have by reason of the attempted taking."

Later the judge made a final decree in accordance with his memorandum of decision; and the defendant appealed.

The material part of R. L. c. 28, § 2, is as follows: "Such boards [of park commissioners] may locate public parks within the limits of their respective cities or towns and for that purpose may from time to time take in fee, by purchase, gift, devise or otherwise, land which they consider desirable therefor . . . ; but no land shall be taken or expenditure incurred until an appropriation sufficient for the estimated expense thereof shall have been made by a vote of two thirds of the legal voters present and voting at a town meeting, or in a city in which the city council consists of two branches by a vote of two thirds of the members of each branch, and in a city in which there is a single legislative board, by a vote of two thirds of the members thereof, present and voting thereon. Such expenditures shall not exceed the appropriations made therefor, and all contracts involving expenditures in excess of such appropriations shall be void."

The case was submitted on briefs.

*C. H. Beckwith & R. H. Tilton*, for the defendant.

*J. F. O'Connell, J. E. O'Connell & D. T. O'Connell*, for the plaintiff.

LORING, J. This is a bill in equity to remove a cloud on the plaintiff's title to land in the city of Springfield. The case is here on an appeal from a decree in favor of the plaintiff. In their attempt to take the plaintiff's land the park commissioners of the defendant city reversed the order of proceeding laid down in the statute under which they undertook to act. The statute (R. L. c. 28, § 2) provides that no land shall be taken until an appropriation has been made. The park commissioners first undertook to take the plaintiff's land and afterward an appropriation was made by the defendant city. The defendant contends that the subsequent appropriation made the previous taking a valid one. That contention is concluded by the decision of this court in *Lajoie v. Lowell*, 214 Mass. 8. The defendant would have us lay that decision on one side because the statutory requirement there in question was enacted for the direct benefit of the landowner. We

do not stop to consider whether the requirement of R. L. c. 28, § 2 (that the taking should not be made until the money had been appropriated) was not made in part for the benefit of the landowner. That fact is not of consequence. The doctrine on which *Lajoie v. Lowell* was decided is that the taking of property by eminent domain is an act *strictissimi juris* and is valid only when the statutory requirements are performed with exactness. When the railroad company in *Lajoie v. Lowell* attempted to take the plaintiff's land lying outside of its five rod location it had no jurisdiction to do so because it had not obtained permission from the county commissioners. After jurisdiction was obtained by the subsequent act of the county commissioners no taking was made. That doctrine applies in the case at bar.

There is nothing in the defendant's contention that the plaintiff has mistaken his remedy and should have brought a petition for certiorari. A taking which is invalid for lack of jurisdiction can be shown to be a nullity whenever it is set up in a court of law. See, for example, *Lajoie v. Lowell*, *ubi supra*; *Whitten v. Haverhill*, 204 Mass. 95. *A fortiori* such a taking can be made the subject of a bill to remove a cloud on title.

*Decree affirmed with costs.*

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### WALTHAM CO-OPERATIVE BANK vs. WILLIAM J. BARRY & others.

Middlesex. October 14, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Equity Jurisdiction*, To cancel discharge of mortgage made on margin of record by mistake. *Mortgage*, Of real estate. *Attachment*.

In a suit in equity by a mortgagee of real estate for the cancellation of a discharge of the plaintiff's unpaid mortgage which had been entered by mistake on the margin of the record in the registry of deeds under R. L. c. 127, § 34, as amended by St. 1908, c. 149, it appeared that two of the defendants were attaching creditors of the mortgagor, who had attached the real estate in actions of contract after the apparent discharge of the mortgage on the record and without knowledge of the mistake, and it was *held* that the bill must be dismissed as to the defendant attaching creditors, whose liens took precedence of the plaintiff's mortgage.

BILL IN EQUITY, filed on April 28, 1917, by the Waltham Co-operative Bank, a corporation, against William J. Barry and Nellie T. Barry, his wife, also against a second mortgagee and certain attaching creditors, seeking the cancellation of a discharge of a mortgage to the plaintiff, which was entered by mistake on the margin of the record of such mortgage in the registry of deeds for the Middlesex South District, the mortgage never having been paid.

The case was heard by *J. F. Brown, J.*, who made a memorandum of decision as follows:

"The plaintiff held two mortgages, one given by Nat. C. Whittaker, recorded on page 574, and one given by the defendant Wm. J. Barry, recorded on page 575 of the same record book in the registry of deeds. As this book is opened the record of the Whittaker mortgage appears on the left hand page and the record of the Barry mortgage appears on the right hand page.

"On November 26, 1915, the treasurer of the plaintiff went to the registry of deeds to discharge the Whittaker mortgage, then paid. But by accident and mistake the assistant register of deeds stamped the words of discharge upon the margin of the Barry mortgage and the treasurer signed it. The Barry mortgage was not paid. It appears by the records in the registry of deeds that the defendant Tuttle is the holder of a mortgage from Barry, dated July 14, 1916, and recorded January 17, 1917, and that the other defendants (except Nellie T. Barry who is joined as the wife of Wm. J. Barry) are subsequent attaching creditors of the defendant Wm. J. Barry, the attachment of McGlinchey being recorded on January 13, 1917, the attachment of Farley and MacNeill being recorded on February 8, 1917, and the attachment of Pittsburgh Plate Glass Company being recorded on April 10, 1917.

"I find that the words of discharge of the Barry mortgage were placed upon the margin of the Barry mortgage on the record book in the registry of deeds by accident and mistake and did not prove the payment of the mortgage debt, or cancel or discharge the mortgage, but were invalid and void.

"Let a decree be entered declaring the discharge inoperative and void, and prohibiting and enjoining the defendant Wm. J. Barry and all persons claiming by through or under him from setting up, using or relying upon said words of discharge, either as proof of the payment of the mortgage debt, or a discharge of the mortgage."



Later by order of the judge a final decree was entered in accordance with the memorandum of decision. The defendants J. A. McGlinchey and the Pittsburgh Plate Glass Company appealed from the decree.

The material part of R. L. c. 127, § 34, as amended by St. 1908, c. 149, is as follows:

"Section 34. A mortgage may be discharged by an entry acknowledging the satisfaction thereof, made on the margin of the record of the mortgage in the registry of deeds and signed by the mortgagee, or by his executor, administrator or assignee, and his signature witnessed by the register of deeds or by the assistant register of deeds, or by some person employed in the registry of deeds who shall be designated by the register for that purpose by a writing which shall be recorded in said registry; and such entry shall have the same effect as a deed of release duly acknowledged and recorded. . . ."

*W. J. Bannan*, (*J. L. Harvey* with him,) for the defendant McGlinchey.

*C. F. French*, for the plaintiff.

BRALEY, J. If Barry, the defendant mortgagor, were the only party against whom relief is sought, the mistake of the plaintiff's treasurer in discharging the unpaid mortgage on the margin of the land records under the provisions of R. L. c. 127, § 34, as amended by St. 1908, c. 149, could be rectified by the decree for cancellation which was entered by the trial court. *Swasey v. Emerson*, 168 Mass. 118. *Holbrook v. Schofield*, 211 Mass. 234.

But the defendants McGlinchey and the Pittsburgh Plate Glass Company after the discharge had been recorded and without actual notice of the mistake, having attached the land on mesne process as the property of Barry in actions of contract which were pending when the bill was filed, the question for decision is whether their rights as attaching creditors are subordinate to the mortgage.

The plaintiff appeared on the record at the date of the attachments to have been the owner of a mortgage which had been discharged under the statute whereby a discharge on the margin of the page where the instrument appears of record is given the same force and effect as a deed of release duly executed, acknowledged and recorded. While a by-law of the bank authorized the treasurer,

or in his absence the president or vice-president, to discharge a mortgage upon receipt of the amount, it is not alleged that the treasurer exceeded his powers or perpetrated a fraud upon the bank. The conditional limitation of the by-law was undisclosed, and the defendants rightly could rely on the record as conclusive evidence of the estate and title of their debtor. *Welch v. Priest*, 8 Allen, 165. *Adams v. Pratt*, 109 Mass. 59. *Stark v. Boynton*, 167 Mass. 443, 445. *Livingstone v. Murphy*, 187 Mass. 315, 319, 320. *Wenz v. Pastene*, 209 Mass. 359. The defendants accordingly are innocent purchasers for value, and, if judgment is recovered, the lien of the attachment has precedence over the plaintiff's mortgage. *Woodward v. Sartwell*, 129 Mass. 210. *Cowley v. McLaughlin*, 141 Mass. 181, 182. *D'Arcy v. Mooshkin*, 183 Mass. 382. *Whitney v. Metallic Window Screen Manuf. Co.* 187 Mass. 557.

The cases of *Bruce v. Bonney*, 12 Gray, 107, and *Willcox v. Foster*, 132 Mass. 320, on which the plaintiff places much reliance, do not support its contention, that a marginal discharge executed by mistake is absolutely void under the circumstances shown by the present record. It was held in those cases that where through mistake a discharge instead of an assignment of a mortgage had been taken, and no intervening rights were affected, a court of equity can order the discharge cancelled and the assignment substituted. *Short v. Currier*, 153 Mass. 182, 184.

The decree as to these defendants must be reversed, and the bill dismissed with costs.

*Ordered accordingly.*

NEW ENGLAND STRUCTURAL COMPANY vs. JAMES RUSSELL BOILER  
WORKS COMPANY & others.

JOSEPH W. PARKER, trustee in bankruptcy, vs. JAMES RUSSELL  
BOILER WORKS COMPANY & another.

Suffolk. October 15, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Contract*, What constitutes. *Equity Jurisdiction*, To enforce promise made to another for the plaintiff's benefit. *Agency*, Existence of relation.

A steel contractor agreed to furnish to a builder the structural steel required for a building to be constructed by the builder for a boiler company. There was nothing in the contract to show that in making it the builder was acting as the agent of the boiler company. The steel was furnished under this contract as required for the building, but it was not furnished upon any promise of the boiler company to the steel contractor. In the contract between the builder and the boiler company for the construction of the building there was nothing constituting the builder the agent of the boiler company in making the necessary contracts for labor and materials which the builder agreed to provide at a cost not to exceed, including the builder's profit on a percentage basis, the entire price for which the builder was to construct and complete the building. The builder became bankrupt, and the steel contractor brought a suit in equity against the boiler company and the trustee in bankruptcy of the builder, seeking to have the boiler company ordered to pay the plaintiff for the structural steel furnished for the building instead of paying the contract price to the trustee in bankruptcy of the builder. The plaintiff contended that the evidence showed that it was the intention of the parties that, upon a statement by the builder of the amount, the boiler company as principal should pay all bills for materials furnished by subcontractors. *Held*, that, even if the contract between the builder and the boiler company showed such an intention of the parties to that contract, the promise was not made to the steel contractor but to the builder, and that the steel contractor could not maintain a suit in equity to enforce payment to him founded on a promise made for his benefit to another person, from whom alone the consideration moved and who was not his agent.

BILL IN EQUITY, filed in the Superior Court on May 11, 1917, by the New England Structural Company, a corporation, against the James Russell Boiler Works Company, a corporation, Herbert M. Apted and Peter J. McDuffee, copartners doing business under the firm name of Apted and McDuffee, and (by substitution for B. Devereux Barker) Joseph W. Parker, as the trustee in bankruptcy of the defendants Apted and McDuffee. The prayers of

the bill were (1) that the defendant James Russell Boiler Works Company be ordered to pay to the plaintiff the amount due and payable by that defendant for and on account of the steel delivered by the plaintiff to that defendant free and clear from any claim against that defendant by the defendant Parker, (2) that the defendant Parker be declared a trustee for the benefit of the plaintiff of any claim which he had against the defendant boiler works company for the steel so delivered by the plaintiff and (3) for further relief; also a

CROSS BILL by Joseph W. Parker, the trustee in bankruptcy of Herbert M. Apted and Peter M. McDuffee, copartners under the name Apted and McDuffee, against the James Russell Boiler Works Company and the New England Structural Company. The prayers of the cross bill were (1) that the James Russell Boiler Works Company be ordered to pay to the plaintiff (in the cross bill) the amount of \$10,553.86 now retained by it from the amounts due from it to this plaintiff free from all claim of lien or equity by the New England Structural Company, with interest thereon, (2) that the claim of the New England Structural Company to a lien or any equitable right whatsoever upon said sum of \$10,553.86 in the hands of the defendant James Russell Boiler Works Company be denied and the New England Structural Company remitted to its proof of claim in bankruptcy against the bankrupt estates of Apted and McDuffee, (3) that the James Russell Boiler Works Company, its agents, servants or attorneys be enjoined from paying out said sum of \$10,553.86 now retained by it as aforesaid or any part thereof to the New England Structural Company or to any one other than this plaintiff pending the further order of the court, and (4) for further relief.

The following stipulation was filed in court signed in behalf of all the parties to the bill and the cross bill:

"Boston, Mass., January 26, 1918.

"It is hereby stipulated and agreed by and between the parties hereto as follows:

"That structural steel was furnished and delivered by the New England Structural Company, for a boiler shop on the land of the James Russell Boiler Works Company, substantially in accordance with specifications prepared by Monks and Johnson, engineers, and referred to in a contract between the New England

Structural Company and Apted and McDuffee, dated December 5, 1916; that there is due and unpaid for said steel the sum of \$10,553.86 and no more; that such sum without interest is due either to the New England Structural Company or to Joseph W. Parker, trustee in bankruptcy of said Apted and McDuffee; and that the James Russell Boiler Works Company now holds the said sum as a stakeholder, and will pay the same without interest either to the New England Structural Company or to the said Joseph W. Parker, trustee, whichever may be found to be entitled thereto, but shall not be held to be liable to both; and that such payment shall constitute a full discharge and satisfaction of the obligation of the James Russell Boiler Works Company to both of said parties on account of such delivery of steel.

"Nothing herein contained shall be construed as affecting the contention of either claimant to the fund as against the other by way of estoppel, admission, or otherwise."

The case was heard by *Chase, J.*, a commissioner to take the evidence to be reported to this court having been appointed under Equity Rule 35. The judge made the following memorandum of decision:

"I cannot find that Apted and McDuffee acted as the agents of the James Russell Boiler Works Company in contracting with the plaintiff. Neither do I find that the plaintiff is entitled to the amount claimed by any assignment thereof.

"Treating this as a bill of interpleader, as seems to be contemplated by the stipulation filed, a decree should be entered declaring that the trustee in bankruptcy of Apted and McDuffee is entitled to the funds in the hands of the James Russell Boiler Works Company, and ordering the latter to pay over said amount to said trustee."

Later the judge made a final decree in accordance with his memorandum of decision; and the New England Structural Company appealed.

*C. M. Rogerson*, for the plaintiff the New England Structural Company.

*H. Williams, Jr.*, (*C. E. Fay* with him,) for the trustee in bankruptcy of Apted and McDuffee.

*BRALEY, J.* It is unnecessary to state at length the allegations of the bill and the cross bill, as the stipulation of the parties entered

into and filed before the cases were tried on the merits clearly designates the questions on which they are at issue. The plaintiff furnished and delivered structural steel for a boiler shop to be built on the land of the defendant boiler works company, the owner, substantially in accordance with specifications prepared by a firm of engineers, who are referred to in the contract between the plaintiff and Apted and McDuffee, defendants in the original bill. We shall, for convenience, refer to the boiler works company as the company and to Apted and McDuffee as the builders. It is to be assumed on the record that the boiler shop has been completed in accordance with the contract, and that the sum of \$10,553.86 in the possession of the company is equivalent to the unpaid amount due to the plaintiff. It is agreed that this amount without interest is payable to either the plaintiff or to the trustee in bankruptcy of the builders, the plaintiff in the cross bill, and that payment to either of them under a decree of the court is to be a full discharge and satisfaction of the company's liability. The trial judge having decreed that the trustee was entitled to the money, the case is before us on the plaintiff's appeal.

The grounds upon which the argument for reversal rests are that the company is bound by the terms of the contract made with the plaintiff by the builders to pay to it the amount in dispute because the builders acted as the agents of the company in making the contract under which the steel was furnished, or that to avoid circuity of action the company should be ordered to pay the amount directly to the plaintiff, because under a true construction of the contract between the company and the builders the company engaged to pay for the steel, and, if the amount were paid to the trustee in bankruptcy, he would hold the money not for disbursement among the bankrupt's general creditors, but upon a trust solely for the plaintiff's benefit. The contract between the plaintiff and the builders dated December 5, 1916, and the contract of the company with the builders dated December 14, 1916, copies of which are annexed to the bill, are in writing. While neither contract contains language constituting the builders agents for the company, undoubtedly their agency could be shown by parol evidence and, if proved, the company could be reached as a principal. The plaintiff could pursue its remedy concurrently against the agents and the principal, but could have

but one satisfaction of its demands. *Elwell v. State Mutual Life Assurance Co.* 230 Mass. 248.

But the question of agency was an issue of fact upon the evidence introduced at the trial, and, the judge having stated that he could not find that the builders acted as agents for the company, that finding, not appearing to be wrong, is conclusive. The plaintiff's contract with the builders, which preceded the contract with the company, provided in article 8, that the plaintiff was to receive \$10,900 "subject to additions and deductions as hereinbefore provided and that such sum shall be paid" by the builders to the plaintiff in current funds as follows: "Eighty-five per cent . . . of the value of labor and material delivered each and every month to be paid for on or before the twelfth . . . of the month next succeeding." And no inference can be drawn from any language found in this contract that the parties intended that the company and not the builders should be the principal. It follows that the steel was not furnished upon any promise made to the plaintiff by the company.

By the material terms of the contract between the builders and the company the sum to be paid to the builders for work and materials included the cost of the material, labor and insurance plus eight per cent, "with the express understanding, however, that the cost including said eight per cent shall not exceed thirty-five thousand dollars," and that such sum shall be paid by the company to the builders in current funds as follows: The builders shall furnish to the company on Thursday of each week a payroll for all labor for the week ending Wednesday evening, which shall thereupon be paid by the company on or before twelve o'clock noon on Friday of the same week; and the builders shall also furnish from time to time to the company a statement of all bills for material, insurance and equipment if hired, as the same are rendered, which bills shall be paid by the company within thirty days from the date of said bills, unless said bills provide for a special discount for payment within a shorter time, in which case the company shall pay within said shorter time. It is further stipulated that, if at any time there shall be evidence of any lien or claim for which if established the company might become liable, and which is chargeable to the builders, the company shall have the right to retain out of any payment due or

thereafter to become due an amount sufficient completely to indemnify it against such lien or claim. The builders also are not to place any order or let "any sub-contracts in connection with the work in excess of \$500.00 without first obtaining the approval of the" company.

It is plain that all these provisions are designed to protect the company against liens for labor or materials, and no language is found constituting the builders the company's agent in making the necessary contracts for labor and materials which the builders as principals have bound themselves to provide, but which were not to exceed, including their profit on a percentage basis, the entire price for which they agreed to build and complete the shop. We are unable to perceive any sound reason for reading into an unambiguous building contract words which the parties did not choose to insert, or to adopt a construction which ignores or overrides the primary provision that the builders, in consideration of the agreements therein made by the company, agree with the company, that the builders "shall and will provide all the materials and perform all the work for the construction" of a boiler manufacturing plant on land of the company, as shown on the drawings and described in the specifications prepared by the engineers which "become hereby a part of this contract." While the plaintiff's treasurer testified that the steel was charged on their books of account to the company, it does not appear that any bill was ever rendered or that while the work was in progress a partial payment was made by the company to the plaintiff. And neither this agreement nor the record contains anything to show that the company was to hold and pay to the plaintiff a specific sum.

But, even if the intention of the parties was, as the plaintiff contends, that, upon a statement by the builders of the amount, the company as the principal engaged to pay all bills for material furnished by subordinate contractors, the promise was not made to the plaintiff but to the builders. Whatever may have been decided to the contrary in *Arnold v. Lyman*, 17 Mass. 400, *Hall v. Marston*, 17 Mass. 575, *Cabot v. Haskins*, 3 Pick. 83, and *Carnegie v. Morrison*, 2 Met. 381, cited and relied on by the plaintiff, it is settled by *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, that the person for whose benefit a promise is made to another person



from whom alone the consideration moves, cannot maintain an action against the promisor, "unless either the latter has also made an express promise to the plaintiff or the promisee acted as the plaintiff's agent merely."

The plaintiff having failed to bring itself within the exception to the general rule, fully pointed out in *Mellen v. Whipple*, 1 Gray, 317, that, an action may be maintained where the defendant "has in his hands money which, in equity and good conscience, belongs to the plaintiff," as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, "either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it was delivered to him, to pay such creditors," the decree should be affirmed.

*Ordered accordingly.*

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JAMES A. MARTIN & another vs. JAMES CUNNINGHAM, SON AND COMPANY.

Suffolk. October 16, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Contract, Implied in law, Rescission, Construction.*

An order in writing for the purchase of a motor hearse provided in the clause relating to the mode of payment as follows: "A payment of Two Hundred & Fifty dollars accompanies this order, which is to be returned only if the order is not accepted. Two Hundred & Fifty Dollars in 30 Days. \$500.00 dollars to be paid on arrival of said vehicle . . . and the balance in equal monthly notes of \$150 each . . . with 6 per cent interest from date of arrival." The order was accepted by the seller. The buyer made the first two payments of \$250 each, but the seller failed to deliver the motor hearse within the time required by the contract, whereupon the buyer rescinded the contract, cancelling his order and demanding back the \$500 paid by him. In an action by the buyer against the seller to recover this sum, the defendant contended that the plaintiff was entitled to recover only \$250, the \$250 first paid having been forfeited under the terms of the contract. *Held*, that the contract was not susceptible of the construction contended for by the defendant, the meaning of the provision being that, if the order was not accepted, the money paid in advance would be refunded, but that, if the order was accepted and the buyer became bound to pay the stipulated price, the payment of \$250 would be credited, leaving a balance, as stated, to be paid in cash and notes; and that the plaintiff was entitled to recover the whole amount of \$500 paid by him, the consideration for which had failed.

CONTRACT for \$500 paid by the plaintiffs under a contract in writing for the purchase of a motor hearse. Writ in the Municipal Court of the City of Boston dated February 6, 1918.

The declaration was in two counts; the first count being for money had and received to the use of the plaintiffs, and the second count alleging that the plaintiffs and the defendant entered into a written contract, a copy of which was annexed to the declaration, for the purchase of a motor hearse; that the plaintiffs paid the defendant \$500 pursuant to the contract, but that the defendant did not deliver the hearse within the time contemplated by the contract; wherefore the plaintiffs repudiated and cancelled the contract and demanded the return of the \$500.

The answer as amended contained a general denial and an allegation that the delay in delivery was due to a cause unavoidable or beyond the control of the defendant.

The contract, of which a copy was annexed to the declaration, was as follows:

"James Cunningham, Son & Co.

"May 3rd, 1917

"Please Ship to James A. Martin & Son as near the First day of August, 1917, as practicable, the following described Staigh Motor Hearse for which we agree to pay the sum of \$4250 dollars and the freight thereon from Rochester, N. Y., as follows:

"A payment of Two Hundred & Fifty dollars accompanies this order, which is to be returned only if the order is not accepted. Two Hundred & Fifty Dollars in 30 Days. \$500.00 dollars to be paid on arrival of said vehicle at Portland, Maine. James A. Martin & Son, and the balance in equal monthly notes of \$150 dollars each, payable at the Portland National Bank, with 6 per cent interest from date of arrival.

"We also agree to give as security for said notes a mortgage or trust deed on said vehicle, in the standard form used by you, for the sum of \$3250 dollars and we also agree to keep the said vehicle insured against loss by fire, theft and collision and pay the premiums thereon until the last payment becomes due, said policy of insurance to be issued in our name; with loss, if any, payable to James Cunningham, Son & Co., as its interest may appear.

"Standard Warranty.

"We warrant the motor vehicles sold by us for ninety days after

the date of delivery, this warrant being limited to the furnishing at our factory of such parts of the motor vehicle as shall, under normal use and service, appear to us to have been defective in material or workmanship.

"This warranty is limited to the shipment to the purchaser, without charge except for transportation, of the part or parts intended to replace the part or parts claimed to have been defective and which, upon their return to the factory for inspection, all transportation charges prepaid, we shall have determined were defective.

"No warranty whatever in respect to tires, rims, radiators, coils or batteries is made.

"The condition of this warranty is such that if the motor vehicle to which it applies is altered, or repaired, without written authority from the factory or its branches, manufacturer's liability under this warranty shall cease.

"The purchaser understands and agrees that no warranty of the motor vehicle is made, or authorized to be made, by the Company, other than that hereinabove set forth.

"We hereby agree to purchase said vehicle on the terms and conditions above stated, and it is expressly agreed and understood in case this order is accepted, that the above contains the entire agreement in regard to and with reference to the sale and purchase of said vehicle.

"Strikes and other delays unavoidable, or beyond your control will relieve you from prompt fulfillment of this order. All verbal agreements are contained in this order and purchaser acknowledges receipt of the copy of this order."

Here followed specifications for the hearse and the signatures of the parties.

At the trial in the Municipal Court the following facts appeared: The first payment of \$250 accompanied the order as required by the contract, and the second payment of \$250 was made by the plaintiffs in proper course. The order was accepted by the defendant, and work was begun under it, but the motor hearse was not shipped to the plaintiffs on August 1, and had not been shipped to them by October 2, 1917. On that date the plaintiffs wrote to the defendant cancelling the order. Considerable correspondence between the parties followed, and on October 17, 1917, an attor-

ney wrote to the defendant on behalf of the plaintiffs, demanding the return of the \$500 paid by them under the contract.

The defendant introduced evidence that the motor hearse was finally completed the latter part of October, 1917, but the first intimation that it was ready for shipment was received by the plaintiffs in a letter from the defendant dated November 17, 1917. The motor hearse finally was sold by the defendant after notice to the plaintiffs at a price \$250 less than the contract price.

Under the clause in the contract providing that "strikes and other delays unavoidable or beyond your control will relieve you from the prompt fulfillment of this order," the defendant introduced evidence tending to show that the delay was caused, in the first place, because the motor required a particular kind of transmission, which was only made by a certain gear company, an independent contractor, that this company did not deliver transmissions as agreed, but was several months behind in its deliveries; that the particular type of transmission could not be obtained elsewhere, and that a different kind of make could not be used without altering the engine and rebuilding the entire hood of the car, entirely changing its appearance and causing more delay; and, in the second place, because of illness in the family of the body builder working upon this order which kept him from work about four weeks, and because it was impossible to hire a competent substitute in his place.

At the close of the evidence, the defendant asked the judge to make the following rulings of law:

- "1. On all the evidence, the plaintiffs are not entitled to recover.
- "2. If the delay in delivery of the motor hearse was due to a cause unavoidable or beyond the control of the defendant, the plaintiffs are not entitled to recover.
- "3. By the terms of the contract, the defendant fully performed, if it was ready to deliver the hearse as soon as practicable after August 1 as the delays unavoidable or beyond its control would permit.
- "4. The plaintiffs in any event are not entitled to recover the first payment of \$250, which by the terms of the contract was to be returned only if the order was not accepted, the order having been accepted and the hearse having been built."

Upon these rulings, the judge made the following memorandum:

"1st and 4th refused, 2d and 3d allowed as academic questions, but I do not find facts premised in the requests."

Thereupon the judge found for the plaintiffs in the sum of \$500 with interest from October 17, 1917, and, at the request of the defendant, reported the case to the Appellate Division.

The Appellate Division ordered the clerk to make the following entry: "Finding for the plaintiffs for \$250 and interest thereon from October 17, 1917." The plaintiffs appealed.

*A. D. Welch* of Maine, (*G. F. James* with him,) for the plaintiffs.

*L. C. Doyle*, for the defendant.

**BRALEY, J.** The evidence is not reported and, the questions of fact on which the first, second and third requests are predicated having been decided adversely to the defendant, nothing remained but the assessment of damages, the measure of which as presented by the fourth request is the only question raised on the record.

The plaintiffs having advanced \$500, which is the amount awarded by the trial judge, contend, that the decision of the Appellate Division, that only \$250 could be recovered, should be reversed. The defendant is the vendor, and, because of its material failure in performance, the plaintiffs, in whom title to the motor hearse never vested, had the right to rescind. *Ballou v. Billings*, 136 Mass. 307, *Earnshaw v. Whittemore*, 194 Mass. 187, 192, and cases cited. And the consideration having entirely failed, they are entitled to recover back the money paid on account of the contract price. *Moore v. Curry*, 112 Mass. 13. *Graham v. Hatch Storage Battery Co.* 186 Mass. 226, 230. *Pope v. Allis*, 115 U. S. 363. The clause relating to the price and mode of payment reads as follows: "A payment of Two Hundred & Fifty dollars accompanies this order, which is to be returned only if the order is not accepted. Two Hundred & Fifty Dollars in 30 Days. \$500.00 dollars to be paid on arrival of said vehicle . . . and the balance in equal monthly notes of \$150 each . . . with 6 per cent interest from date of arrival."

It is urged by the defendant that the purpose of the preliminary payment was to guarantee this amount if the order after acceptance was subsequently cancelled by the plaintiffs. But the contract, the printed form of which in blank was furnished by the defendant, is not so worded, and the plaintiffs are not shown to have been in default. The whole clause means, If your order is not accepted

the money will be refunded, but if it is accepted you become bound to pay the stipulated price, and the money will be credited, leaving a balance, the amount of which is stated, to be paid in cash and notes. *Griggs v. Moors*, 168 Mass. 354, 360. The defendant having accepted the offer or proposal thereupon entered on the performance of a contract under which the amount in dispute was to be applied in part payment of the entire price. *Bishop v. Eaton*, 161 Mass. 496, 499. *Lennox v. Murphy*, 171 Mass. 370, 373. If the payment is treated as in the nature of liquidated damages for anticipated non-performance, the answer is that the plaintiffs have fully performed the agreement. If upon acceptance it is treated as in the nature of a forfeiture, they must be deemed to have intended to make a gift of the amount to the defendant. The plaintiffs moreover, who have acted in good faith, instead of being made whole will lose one half of their money, while the defendant, although cast in damages, obtains an equivalent pecuniary benefit or enrichment; a result not to be reached unless the express wording of the instrument admits of no other construction.

The defendant also cites *International Text Book Co. v. Martin*, 221 Mass. 1, as decisive that this provision is to be deemed an independent covenant. But in that case the agreement expressly provided that when accepted it should not be subject to cancellation, and that in no event would the plaintiff, who had never made default, be required to refund any part of the money paid for the scholarship which he agreed and was ready to furnish.

We are of opinion for the reasons stated, that the decision of the Appellate Division should be reversed, and the report of the trial judge should be dismissed.

*So ordered.*

## EUGENE S. FARNUM vs. HOWARD G. RAMSEY.

Worcester. October 17, 1918. — November 25, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Sale. Agency. Contract, What constitutes. Practice, Civil, Exceptions, Charge.*

In an action for the price of five tons of coal, where the defendant testifies that he bought the coal from a person other than the plaintiff and that he paid for the coal by crediting the price as part of the purchase money for a motor cycle which he delivered to such person under a contract of conditional sale, and where the plaintiff contends that such third person was his agent, and the jury find for the defendant, the plaintiff is not aggrieved by a refusal of the judge at the trial to rule that, "There is no evidence on which the jury can find that [the third person] was authorized as the plaintiff's agent to purchase any motor cycle with title to be conferred upon said [third person] at the time of the purchase," because, if the third person was the plaintiff's agent and the plaintiff could call on him to account for the motor cycle, it was immaterial that the title was put by the defendant in such agent's name.

In an action of contract for the price of coal alleged to have been sold by the plaintiff to the defendant, which the defendant testified that he bought from a third person individually, although such person was alleged by the plaintiff to have been his agent, where the jury found for the defendant, it was *held* that the plaintiff was not aggrieved by a refusal of the judge at the trial to rule, that, if the defendant used the coal after notice from the plaintiff that the coal was his and not the third person's or if the circumstances ought to have led the defendant to believe that it was the plaintiff's coal, the defendant was liable, because, although these facts might have had a bearing in an action of tort for a conversion of the coal, they were by no means conclusive of the defendant's liability in the action of contract, if indeed they had any bearing at all on such liability.

Where, upon an exception to a part of the charge of a judge, the part of the charge excepted to appears to be obscure but the rest of the charge is not set forth nor described, it cannot be said that the part of the charge excepted to may not have been made plain by the rest of the charge, and the mere obscurity of that part of the charge taken by itself does not show error affirmatively, as an excepting party must do in order that his exception should prevail.

CONTRACT to recover \$42.50, as the price of five tons of coal at \$8.50 a ton sold and delivered by the plaintiff to the defendant, with interest thereon. Writ in the Second District Court of Southern Worcester dated May 31, 1916.

The answer contained a general denial and further alleged that if the plaintiff delivered the coal it was not delivered to be charged to the defendant but was delivered on account to be charged to another party. There was no allegation of payment.

On appeal to the Superior Court the case was tried before *Bell, J.* The evidence is described in the opinion. At the close of the evidence the plaintiff asked the judge to give to the jury the following instructions:

"1. There is no evidence on which the jury can find that Clarence Sawyer was authorized as the plaintiff's agent to purchase any motor cycle with title to be conferred upon said Sawyer at the time of the purchase.

"2. If the jury find on the evidence that at some time after the delivery of the coal concerned the defendant learned that said coal was the property of the plaintiff, and the defendant did not return said coal to the plaintiff, but continued using it, or the remainder thereof, the plaintiff is entitled to recover.

"3. If the jury find on the evidence that coal owned by the plaintiff was actually delivered by the plaintiff or some person authorized in his behalf to the defendant or some person duly authorized by him to receive the same, and that at some time thereafter the plaintiff informed the defendant that the said coal was owned by the plaintiff, the plaintiff is entitled to recover, provided it appears that the defendant did not return said coal to the plaintiff, but continued using the same.

"4. If the jury find that the circumstances under which the defendant entered into the contract with Clarence Sawyer, as claimed by the defendant, were such as should have put a reasonable man on his guard, and caused him to suspect that said coal was not owned by Sawyer, but by the plaintiff, and it appears that said coal actually was owned by the plaintiff, and that the use and benefit thereof was derived by the defendant, the plaintiff is entitled to recover."

The judge refused to give any of these instructions to the jury and as a part of his charge gave the following instruction, to which the plaintiff excepted:

The question is "whether those five tons were delivered to the defendant as the property of Farnum, or when delivered to Ramsey through other persons reached Ramsey as the property of



Sawyer and in payment for Sawyer for that debt and that was authorized by Farnum or whether Farnum directly or indirectly authorized Sawyer to deliver this coal before the coal was delivered as Sawyer's coal and in payment of Sawyer's debts. If so, of course it is paid in payment of Sawyer's debt. On the other hand if that coal went to Ramsey without any authority of Farnum and treated as his own and not to apply on Sawyer's debt and it was Farnum's coal and was always Farnum's coal and reached Ramsey as Farnum's coal, not having been paid for is the plaintiff's case."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

*F. W. Morrison, H. Davenport & W. B. Feiga*, for the plaintiff.

*S. B. Taft*, for the defendant.

LORING, J. This is an action of contract for the price of five tons of coal alleged to have been sold by the plaintiff to the defendant. The defendant had a verdict and the case is here on exceptions taken to the refusal to give the four instructions printed on page 287 and on one exception taken to that part of the charge of the presiding judge there set forth.

The defendant was put on the witness stand by the plaintiff. He testified "that he bought the coal of Sawyer and not of" the plaintiff; that Sawyer wanted the defendant to sell him a motor cycle and offered to "give as the first payment five tons of coal, which he [Sawyer] said was his personal property;" that he (the defendant) "agreed to this and made out a conditional bill of sale of the motor cycle to Sawyer;" that "later" he "received from Sawyer" a bill on Farnum's "regular bill head" in these words: "Uxbridge, Mass., Oct. 22, 1915. . . . Sold to Mr. Howard Ramsey. 5 tons Lehigh Chestnut Coal at \$8.50. . . . \$42.50 (for later delivery). This amount is paid when applied as partial payment on Indian motor cycle No. 79 F. 816. E. S. Farnum." This was marked and will be referred to as exhibit I. The defendant further testified that the coal was delivered "in the latter part of October" by Sawyer; that he knew at the time that "Sawyer was employed by the plaintiff as the driver of a team by which coal was delivered." In addition the defendant testified that "at some time later the plaintiff" asked him to change the lease of the motor cycle "from

Sawyer to him" and he refused to do so "until he [Sawyer] broke the bargain" that Sawyer made with him.

The plaintiff testified that Sawyer told him "that he, Sawyer, was anxious to have a motor cycle but could not get one as Ramsey would not trust him; that the plaintiff said that if Sawyer would stop drinking the plaintiff would buy the motor cycle and that Sawyer could use it and then buy it from the plaintiff, paying for it out of his, Sawyer's, wages; that the plaintiff further suggested that Ramsey would probably be willing to credit his winter's supply of coal in part payment and directed Sawyer to go to Ramsey and see if the trade could be made; that later, Sawyer returned and reported that Ramsey was willing; that the bill signed as produced by Ramsey was then sent to Ramsey to be delivered by Sawyer." There was no evidence connecting the defendant with the facts so testified to. The plaintiff further testified that "Sawyer broke his promise to stop drinking" and the plaintiff told the defendant that the sale of the motor cycle "should have been made to [him] the plaintiff;" and told him that "he would have to be paid for the coal or have the lease of the motor cycle made to him which the defendant said he could not do because Sawyer had bought it and had not broken the lease."

Sawyer was not put upon the witness stand by either party.

There is a short answer to the first ruling asked for and to the plaintiff's complaint that the title to the motor cycle ought to have been taken in his (the plaintiff's name) and not in Sawyer's name. The short answer is that on the assumption on which the plaintiff proceeded it was immaterial whether the title was put by the defendant in Sawyer's name or in the plaintiff's name. The plaintiff went on the assumption that Sawyer acted as his agent in selling the coal and buying the motor cycle. If he did the title to the motor cycle was in the plaintiff as between the plaintiff and Sawyer although the defendant put the title in Sawyer's name. Since Sawyer acted as the plaintiff's agent any title taken in his agent's name was his.

There are other objections to this request for a ruling which are fatal. But it is not necessary to consider them.

A short answer to the second, third and fourth rulings asked for is that the money due for the coal had been paid by being applied as partial payment on the motor cycle in accordance with the

terms of the bill for the coal delivered by Sawyer to the defendant if that is to be taken to be a bill for the sale of the coal by the plaintiff to the defendant.

It is apparent from the pleadings and the terms of the bill of exceptions however that the case was not tried on the issue of payment. The defence set up at the trial was that the coal was bought by the defendant of Sawyer as Sawyer's coal and for this reason that the defendant was not liable to the plaintiff as purchaser of the coal from him. In that aspect of the case also the second, third and fourth rulings asked for were rightly refused.

In his argument here the plaintiff has relied on *Orcutt v. Nelson*, 1 Gray, 536, and similar cases in support of his contention that the facts set forth in the second, third and fourth requests are as matter of law decisive in his favor. The contention now put forward by him is this: The defendant must be taken to have bought the coal of the plaintiff as matter of law because (1) exhibit I was as matter of law notice to him that the plaintiff claimed to have sold the coal to him and because (2) he used it after receiving that notice. But that contention is not set forth in these requests. There is no reference to exhibit I in any one of these requests. The second and third requests are based on the legal effect of using the coal after notice from the plaintiff that the coal was his and not Sawyer's. And the fourth is based on the effect of using the coal under circumstances that ought to have led him to suspect that it was the plaintiff's coal and not Sawyer's. These facts might have had a bearing upon the defendant's liability if the plaintiff had sued him in tort for conversion of the coal. But they were not decisive (if indeed they had any bearing as matter of law) upon the issue then on trial, namely, Did the defendant buy the coal from the plaintiff and not from Sawyer?

We do not intimate that the contention now made by the plaintiff but not set forth in his request for rulings was correct.

The part of the charge to which the plaintiff took an exception is obscure. For all that appears this part may have been made plain by the rest of the charge. The rest of the charge is not set forth in the bill of exceptions. The burden is on the excepting party to show error. Under these circumstances the plaintiff has not sustained that burden.

*Exceptions overruled.*

COLLECTOR OF TAXES OF WEST BRIDGEWATER vs. HENRY DUNSTER  
& another, executors.

Plymouth. October 17, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Tax, Abatement, Remedy for over-taxation. Executor and Administrator.*

The general principle is well established, that relief against excessive taxation can be had only by abatement and that it is only where the whole tax is void that its invalidity can be shown by way of defence to an action to recover the tax.

The fact, that a will was contested and that it was not allowed by the Probate Court until the time fixed by St. 1909, c. 490, Part I, §§ 42, 72, 73, for the filing by the executor of a list of the taxable property of the estate for each of three successive years after the death of the testator had expired, does not give the executor, who filed no list and no petition for abatement, the right to set up an alleged excessive taxation of personal property in his hands as executor, because he had as matter of law sufficient excuse for delay in filing a list and asking for an abatement until after the lapse of such time subsequent to his appointment as reasonably would enable him to ascertain the nature and amount of the property held by him as executor, and he had failed to file any list or any petition in abatement after that.

In an action against an executor for the collection of such a tax under the circumstances named above, where the defendant was not permitted to show in defence that the tax was excessive, it was said that, as the executor had filed no list and no petition for an abatement, it was not necessary to inquire whether the provisions of the statute fixing the times for filing a list of taxable property and for filing a petition for abatement of a tax had any application at all to such a case.

In the same case it also was said that it was not necessary to consider, whether the fact, that bonds of corporations and shares of corporate stock representing a considerable part of the estate of the testator were at the time of the testator's death in a safe deposit box in a city in another State in the hands of a custodian appointed under the laws of that State who had paid taxes thereon in such State, would have been a sufficient ground for abatement of a part of the taxes sought to be recovered, if that fact had been presented seasonably to the assessors of the taxing town in this Commonwealth.

CONTRACT by the collector of taxes of the town of West Bridgewater against the executors of the will of Horace W. Howard, late of that town, who died on January 14, 1913, for taxes alleged to be due for the years 1913, 1914 and 1915. Writ dated October 11, 1916.

In the Superior Court the case was submitted upon an agreed statement of facts and a supplemental statement of agreed facts to

*Jenney, J.*, who found for the plaintiff and ordered that judgment be entered in his favor in the sum of \$6,714.68. At the request of the parties the judge reported the case upon the pleadings, the agreed statements of fact and the order of judgment for determination by this court.

*A. F. Barker*, for the defendants, submitted a brief.

*O. Storer*, for the plaintiff.

RUGG, C. J. This is an action by the collector of taxes of the town of West Bridgewater in this Commonwealth, to recover taxes assessed for the years 1913, 1914 and 1915 upon the personal estate of Horace W. Howard, who died a resident of that town in January, 1913. There was a contest over the allowance of his will, so that it was not established until January, 1916, when the defendants were appointed his executors. At the time of his death there were several articles of furniture and personal effects and a carriage and a few tools in West Bridgewater, and, as we interpret the agreed facts, they have since remained there. Therefore manifestly some personal estate of the testator was subject to taxation in that town. The assessors of West Bridgewater had jurisdiction to levy a tax. Scarcely any proposition in the law of taxation is more firmly settled than that the sole remedy for over-taxation, arising either from excessive valuation or from the inclusion with property subject to taxation of other property not so subject, is by abatement. *Sears v. Nahant*, 221 Mass. 435, and cases collected. *Sullivan v. Ashfield*, 227 Mass. 24, 26.

The chief contention of the defendants is that they have a right to try the amount for which they ought to have been taxed by way of defence to this action, because they could not put themselves in position to secure an abatement for the reason that they could not file a list within the time required by St. 1909, c. 490, Part I, §§ 42, 72, 73, not then having been appointed executors. That fact is not of consequence under the circumstances shown by this record, because there was as matter of law sufficient excuse for delay in filing a list and asking for an abatement until after the lapse of such time subsequent to their appointment as reasonably would enable them to ascertain the nature and amount of their estate. See § 73 and *Parsons v. Lenox*, 228 Mass. 231. Although there is some plausibility in the argument of the defendants, it does not appear sound. The general principle that relief

against excessive taxation must be had by abatement, and that it is only when the tax is wholly without validity that it can be disputed by way of defence to an action to recover the tax, is well established. It is simple and easily understood, a characteristic of signal value in the administration of tax laws. There are no features in the case at bar of such significance as to make an exception to that salutary general rule.

It is not necessary to inquire whether the time limitations as to the list and petition for abatement are applicable at all to a case like the present, because no list has been filed and no petition for abatement presented. It also need not be determined whether the circumstances that a considerable part of the estate of the testator, consisting of corporation stocks and bonds, was in a safe deposit box in Providence, in the State of Rhode Island, at the death of the testator, and that a custodian appointed under the laws of that State took possession of that property and paid taxes thereon in the city of Providence, would have been sufficient cause for abatement of the taxes now sought to be recovered provided they had been seasonably presented to the assessors of the taxing town by appropriate means. See, in that connection, *Welch v. Boston*, 221 Mass. 155; *Putnam v. Middleborough*, 209 Mass. 456; and *Gray v. Lenox*, 215 Mass. 598.

*Judgment for the plaintiff affirmed.*

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HARRIS LIVERMORE & others, each a trustee, vs. HARRIS  
LIVERMORE & others.

Suffolk. October 18, 1918. — November 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Devise and Legacy. Trust, Administration.*

A testator by his will disposed of the residue of his estate as follows: "All the rest of my property I give devise and bequeath to my four children above named, in equal shares, to be held by each of them during his or her life respectively, in trust, with power, at his or her discretion to sell any or all of the same and reinvest the proceeds thereof on the same trust in marketable income paying securities, or real estate, and the income of said share and proceeds, to receive and have for his or her own use during life. After the decease of each

of my said children whether surviving me or not, I give devise and bequeath his or her said share of my property to his or her issue *per stirpes*, as said issue would inherit from him or her intestate under the laws of Massachusetts." Each of the four children was appointed a trustee and qualified as such. *Held*, that each of the testator's children held one quarter of the residue in trust, with unlimited powers of sale and reinvestment, to pay the income to himself or herself during his or her life with a remainder to his or her issue *per stirpes*, and that the trustees together could give a good title to real estate of the testator held by them in common without obtaining a license from the Probate Court. One of the trustees referred to above bought with the proceeds of personal property received by him as trustee a parcel of real estate, which was conveyed to him as trustee, and he *was instructed* by this court that he held this purchased real estate as trustee and not individually.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 26, 1918, by the four children, three sons and one daughter, of Thomas L. Livermore, late of Boston, each as a separate trustee under the will of Thomas L. Livermore, who died on January 9, 1918, against themselves individually and against the children of each of them, praying for instructions upon the following points:

"1. Is the title of the plaintiffs as trustees in said real estate a title in fee simple or a life estate?

"2. What is the legal title of the plaintiffs as trustees in said real estate?

"3. Have any of the defendants other than the plaintiffs any legal title in said real estate?

"4. Have the plaintiffs as trustees the right and power under the circumstances and for the purposes set out in this bill, and under the terms of said will, to sell said real estate and give title to the same to the purchaser in fee simple, without obtaining leave from the Probate Court so to do?"

The plaintiff Robert Livermore, trustee, also prayed for separate instructions on the following points:

"1. Is the estate of said Robert in said after acquired real estate a fee simple or a life estate?

"2. What is the legal title of said Robert as trustee in said after acquired real estate?

"3. Have any of the three defendants mentioned in the fifth paragraph of this bill [the three children of Robert] any legal title in said after acquired real estate?

"4. Has said Robert as trustee the right and power under the circumstances and for the purposes set out in the fifth paragraph

of this bill, and under the terms of the residuary clause of said will, to sell and convey said after acquired real estate, and to give title to the same in fee simple, without obtaining leave of the Probate Court so to do?"

The case came on to be heard before *Loring, J.*, who reserved it for determination by the full court.

The case was submitted on briefs.

*W. G. Thompson & R. Spring*, for the four children of the testator, individually.

*R. M. Johnson*, for the defendant Bulkeley Livermore Wells, of age, and *pro se* as guardian *ad litem* of the minor defendants.

**BRALEY, J.** The testator, after making certain specific bequests to his daughter and to his sons, disposed of the remainder of his estate as follows, "All the rest of my property I give devise and bequeath to my four children above named, in equal shares, to be held by each of them during his or her life respectively, in trust, with power, at his or her discretion to sell any or all of the same and reinvest the proceeds thereof on the same trust in marketable income paying securities, or real estate, and the income of said share and proceeds, to receive and have for his or her own use during life. After the decease of each of my said children whether surviving me or not, I give devise and bequeath his or her said share of my property to his or her issue *per stirpes*, as said issue would inherit from him or her intestate under the laws of Massachusetts."

The children, who are the plaintiffs, have been severally appointed trustees by the court of probate and, being tenants in common of certain real estate of which the testator died seised in fee simple, they ask for instructions defining their title and powers. The purpose of the testator is manifest. The property is devised and given "in trust," and his intention being certain and the language sufficient, a valid testamentary trust is created. *O'Brien v. Lewis*, 208 Mass. 515. *Sawyer v. Cook*, 188 Mass. 163, 165. The words "during his or her life" relate to the duration of the trust, which as to each one quarter part is limited to the life of the respective beneficiaries. The clause is to be construed as if the testator had devised and bequeathed the residue to trustees to divide the net income equally among his four children, if they survived him, and upon the death of any child to pay over to his or her issue, to



be ascertained as a class, one quarter part of the principal. *Worcester Trust Co. v. Turner*, 210 Mass. 115, 122, 123. The trustees are empowered to sell the whole or any portion of the trust property, and to reinvest the proceeds, and they are not required if a sale is made to obtain a license from the court of probate before the purchaser can obtain a valid title. *Penniman v. Sanderson*, 13 Allen, 193. *Bremer v. Hadley*, 196 Mass. 217.

It appears that one of the plaintiffs with funds received by him as trustee from the executors as part of the proceeds of some of the personal property has bought and taken a conveyance to himself as trustee of a parcel of real property. He is instructed that he holds this real estate as trustee and not individually. The trustees are given an unlimited power of sale and of reinvestment which covers not only the property left by the testator, but property of every description thereafter acquired by them through investment or reinvestment. *Jordan v. Jordan*, 192 Mass. 337. It is not limited to the realty but includes the remainder of the personal property. The money received from the executors having become a part of the trust funds, the real estate into which the money has been converted is impressed with or subject to the trust, and is to be administered as part of the principal. *Thissell v. Schillinger*, 186 Mass. 180, 185. *Allen v. Stewart*, 214 Mass. 109, 113. *Whitman v. Huefner*, 221 Mass. 265.

A decree is to be entered that the plaintiffs as trustees have full authority in the exercise of a sound discretion to sell the real estate or any of the personal property, and to invest and reinvest the proceeds "in marketable income paying securities, or real estate," and that the real estate purchased by one of the plaintiffs, having been bought with trust funds, is held by him subject to the trust.

*So ordered.*

## AMOS WEATHERBEE'S (dependent's) CASE.

Suffolk. October 14, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Workmen's Compensation Act. Proximate Cause.*

Upon a claim under the workmen's compensation act by the dependent widow of an employee, who collapsed and fell to the ground when he was swinging a heavy sledge hammer in breaking stones and died about five minutes later, there was conflicting evidence upon the question, whether the employee's death was due to the strain of swinging the heavy sledge hammer which caused an injury to an already weakened and diseased heart, or whether the cause of his death was a matter of speculation and conjecture. The Industrial Accident Board found that the cause of the employee's death was conjectural and dismissed the claim. *Held*, that the finding of the board was one of fact which could not be set aside, there having been evidence to support it.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board dismissing the claim to compensation of Bertha H. Weatherbee, the dependent widow of Amos Weatherbee, who died on August 5, 1916, when he was employed as a laborer by the town of North Attleborough, which had accepted the provisions of St. 1913, c. 807.

The case was heard by *Wait*, J. The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, declaring that the death of the employee did not result from any injury arising out of and in the course of his employment and that the dependent widow was not entitled to compensation under the act.

The dependent widow appealed.

*H. H. Patten*, for the dependent widow.

*R. Gallagher*, for the insurer.

CROSBY, J. This is a proceeding under the workmen's compensation act. The deceased at the time of his death was in the employ of the town of North Attleborough, as a laborer, and had charge of a stone crusher owned and operated by the town. As a part of his duties, he was required to break stone into small

pieces with a sixteen pound sledge hammer, — the broken pieces to be put into the crusher. At the time of the alleged injury he was breaking stone with the sledge hammer; he had struck several blows and was in the act of striking another, when he collapsed and fell to the ground, dying in about five minutes without regaining consciousness.

It is the contention of the claimant that death was due to the strain of swinging the hammer causing an injury to the heart, which at that time was in a weakened condition from arteriosclerosis. The insurer contends that upon the evidence the cause of death was a matter of conjecture. This contention was sustained by the Industrial Accident Board on review of the report filed by the arbitration committee, a majority of whom had found that the employee's death was the result of an injury which arose out of and in the course of his employment, and the widow's claim for compensation was dismissed.

The findings of the Industrial Accident Board, under the act, on all questions of fact are final and cannot be set aside if there is any evidence to support them. St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14. Whether the deceased received an injury which caused his death, and whether the injury arose out of and in the course of his employment, were questions of fact.

Upon the question whether the employee's death was due to the strain of swinging the heavy sledge hammer, thereby causing an injury to an already weakened and diseased heart, or was a matter of speculation and conjecture, the evidence was conflicting. Accordingly the finding of the board must stand. The case is governed in principle by *John T. Murphy's Case*, 230 Mass. 99, *Sanderson's Case*, 224 Mass. 558, and similar cases. See also *Grant v. Glasgow & South Western Railway*, 1 B. W. C. C. 17.

. Decree affirmed.

## WILLIAM NICHOLS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. October 15, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Negligence, Street railway. Carrier, Of passengers.*

Where the conductor of a street railway car with the seats running lengthwise is passing through the car taking fares and, when he is in the act of pulling the overhead strap to ring in a fare or to give the signal to start the car, a passenger who is behind the conductor begins to rise from his seat in order to make ready to get out at the next stopping place, and the conductor's elbow as his arm descends in pulling the strap comes in contact with the rising passenger and knocks off his eyeglasses, which break and injure one of his eyes, this is a pure accident, and these facts are no evidence of negligence toward the passenger on the part of the conductor.

It is not reasonably practicable to require the conductor of a street railway car before performing his ordinary duties to look on all sides to ascertain whether some change of position by a passenger, not ordinarily to be expected, may result in the collision of some part of the conductor's body with such passenger.

TORT for personal injuries sustained by the plaintiff on October 26, 1915, when he was a passenger on a street railway car of the defendant, by reason of the alleged negligence of the conductor of the car in striking the plaintiff in the face with his arm. Writ dated July 5, 1916.

In the Superior Court the case was tried before *Jenney, J.* The evidence is described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to order a verdict for the defendant. The judge denied the motion and submitted the case to the jury, who were unable to agree upon a verdict. Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*P. Nichols*, for the plaintiff.

*E. P. Saltonstall*, for the defendant.

RUGG, C. J. The plaintiff seeks to recover damages for personal injuries sustained by him while a passenger in one of the defendant's short cars of the older type with the seats running lengthwise. The plaintiff was sitting on the left side at about the middle of the car. While it was stationary at the stop before that at which the plaintiff desired to alight, he started to rise from his seat so as

to be near the door at the next stop. The substance of the plaintiff's testimony was that he started to get up out of his seat and was almost in a standing position, or a little more than half way, when the conductor who was standing directly in front of the plaintiff, facing the rear of the car and looking away from the plaintiff with his hand on the bell rope, pulled the strap for the car to go ahead, and his elbow struck the plaintiff's glasses and broke them and cut his eye. The conductor testified that he did not see the plaintiff at all and had no idea that he was going to get up, that his back was toward the plaintiff, he was coming through the car collecting fares, and was in the act of pulling in a transfer and his arm came down and he felt it strike something and as he turned round he saw the plaintiff and that he was injured. There was other testimony to the effect that the plaintiff started to arise and the conductor to pull in the transfer at about the same time.

There is no evidence of negligence on the part of the conductor. It is manifest from the testimony in its aspect most favorable to the plaintiff that the conductor was doing his duty in the ordinary way, and that there was no reason for him to anticipate that the plaintiff was about to move from his seat. The plaintiff was not in the line of the conductor's vision. The only way a conductor possibly can avoid an accident like this would be by looking in every direction before making any motion which might bring him in contact with any moving passenger. Even that precaution might not avail, for while the conductor might be making the final observation, a passenger might move from the direction first scanned. In the case at bar, it appears that the movements of the passenger and the conductor which resulted in the injury, began simultaneously. It is not reasonably practicable to require a conductor, before performing his ordinary duties, to look on all sides to ascertain whether some change of position by a passenger, not ordinarily to be expected, may result in collision with him.

So far as the defendant is concerned, the record discloses a pure accident arising from the concurrent operation of two independent forces, not avoidable by the exercise of the rational care required of a common carrier respecting its passengers. See, in this connection, *Brown v. Kendall*, 6 Cush. 292.

*Exceptions overruled.*

ANNA E. MCQUESTEN vs. CHARLES E. SPALDING & trustee.

Essex. October 16, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Limitations, Statute of. Bills and Notes. Contract, Validity.*

In an action on a promissory note, in which the defendant pleaded the statute of limitations, it appeared that the note contained a promise to pay to the order of the plaintiff \$2,500 "on demand with interest semi-annually" and that on the note was the following indorsement signed by the defendant, who was the maker: "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's (M A S) estate." The defendant's mother died thirteen years after the date and delivery of the note. The action was brought seven months after the mother's death, when her estate was ripe for settlement. No payment of principal or interest ever was made on the note and no demand upon the defendant for payment ever had been made before the action was brought. *Held*, that, in addition to the promise to pay the principal sum on demand, alternative promises of payment were made, one to pay on demand regardless of any future proceedings in bankruptcy and the other to pay on the settlement of the defendant's mother's estate.

It also was *held* that the plaintiff had the right to elect upon which of these promises to rely, and that he had elected to rely on the promise of the defendant to pay on the settlement of his mother's estate, so that the statute of limitations began to run only from the time of such settlement.

In the same action it was *held* that the instrument sued upon, although not a negotiable note, was clearly a valid contract.

In the action above described there was nothing to show that the defendant ever had been subject to proceedings in bankruptcy, and it was *held* that it was not necessary to determine the precise effect of the promise to pay upon demand as "a preferred note to be paid regardless of any future proceedings in bankruptcy," because, whatever the nature of this promise might be, it was not so illegal or so contrary to public policy as to vitiate the entire instrument and that its presence did not destroy the binding character of the contract sought to be enforced.

CONTRACT upon the instrument in writing which is quoted in full in the opinion. Writ dated October 6, 1916.

The defendant's answer contained, among other things, an allegation "that the cause of action mentioned in the plaintiff's writ did not accrue within six years before the suing out of the plaintiff's writ." An amendment to the answer alleged that the

promise contained in the indorsement was an agreement to give a preference to the plaintiff in the event of any future proceedings in bankruptcy and was void as against public policy and in violation of the bankruptcy act of 1898 and amendments thereto.

The case was tried before *N. P. Brown, J.*, without a jury. At the close of the plaintiff's evidence, the defendant offering no evidence, the plaintiff made a motion asking the judge to order a verdict for her for the reason that upon all the evidence the jury would not be warranted in finding any other verdict. The judge denied this motion. The defendant then made a motion asking the judge to order a verdict for him. The judge allowed this motion and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*I. W. Sargent*, for the plaintiff.

*W. W. Clarke*, for the defendant.

RUGG, C. J. This is an action of contract begun on October 6, 1916, to recover upon a written instrument of the tenor following:

"Nashua, N. H., February 19th, 1903.

For value received I promise to pay to the order of Anna E. McQuesten twenty-five hundred dollars on demand with interest semi-annually.

Chas. E. Spalding.

Ida L. Spalding."

\$2,500

Indorsement.

"This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's (Mary A. Spalding) estate.

Chas. E. Spalding."

The chief contention of the principal defendant is that the plaintiff's action is barred by the statute of limitations.

There was evidence tending to show that the plaintiff lent to the defendant Charles E. Spalding, at his solicitation, \$2,500, and received from him the instrument just quoted, that no payment of principal or interest had been made upon it and no demand had ever been made upon the defendant for payment before the present action; that Mary A. Spalding, the mother of the defendant, died on February 28, 1916, and that her estate was ripe for settlement. If this testimony was believed, the plain-

tiff was entitled to recover. It therefore was error to direct a verdict for the defendant.

The fundamental rule in the interpretation of all written instruments is to ascertain the intent of the parties from all the language employed, attributing appropriate force to every word used. Effect must be given to that intent unless prevented by some positive rule of law. Applying that rule to the instrument here in suit, its meaning is not open to doubt. The entire instrument, including the indorsement, must be scrutinized in order to discover its true signification. While the main body of the instrument standing alone is a simple promissory note payable on demand, its nature in this regard is modified and supplemented by the subsequent writing. The indorsement signed by the defendant is an unequivocal statement to the effect that in addition to the principal sum being payable on demand, alternative promises of payment are made, one to pay on demand regardless of any future proceedings in bankruptcy, and the other to pay on the settlement of his mother's estate. The promise taken in its entirety is to make payment at any one of three different times, (1) on demand, (2) on demand after proceedings in bankruptcy without being affected thereby, and (3) on the settlement of his mother's estate. The selection of the time of payment is left wholly to the volition of the plaintiff in accordance with the particular promise upon which she elects to rely. While such an instrument is not a negotiable note, its validity as a contract is not open to doubt.

The statute of limitations has not run against the plaintiff. Ordinarily the statute of limitations begins to run when the right of action accrues. But that principle has no application as a bar to the facts here disclosed, because, although, if the plaintiff had chosen to exercise that option, she might have brought an action in 1903, yet she expressly chose not to exercise that option but to rely upon the other promise of the defendant to pay on the settlement of his mother's estate. The debt was not due absolutely and unequivocally on demand. It was thus due only in the event that the plaintiff exercised that option. It was her right and privilege to exercise the option that it should become payable on the settlement of the estate of the defendant's mother. There is nothing in the law which prevents the plaintiff



from relying upon that promise of the defendant. That promise did not mature and become operative until the happening of the event upon which it was conditioned, namely, the settlement of the mother's estate. Manifestly with reference to that due date, the statute of limitations has not run.

This conclusion is in harmony with the reasoning of *Mahoney v. Fitzpatrick*, 133 Mass. 151. It is supported by direct decisions in other jurisdictions. *Harris v. Townshend*, 101 Miss. 590. *Blick v. Cockins*, 131 Md. 625, 630, 631. *Sullivan v. Ellis*, 135 C. C. A. 366. The case of *Brown v. Hitchcock*, 69 Vt. 197, somewhat relied on by the defendant, appears to have turned on a question of pleading and not to be an authority contrary to the conclusion here reached.

It is not necessary to determine the precise effect of the promise to pay upon demand as a preferred note regardless of future proceedings in bankruptcy. There is nothing to show that the defendant ever has been subjected to proceedings in bankruptcy. At most it was an attempt to lift in advance the bar that might arise through a discharge in bankruptcy by continuing its force and validity as a binding obligation, or perhaps to create a preference for the debt if proved in bankruptcy proceedings. Without undertaking to determine the effect of such a promise, see *Lerow v. Wilmarth*, 7 Allen, 463, it is enough to say that there is nothing in its nature so illegal or contrary to public policy as to vitiate the entire instrument. Whatever its nature may be, its presence does not destroy the binding character of the contract here sought to be enforced.

*Exceptions sustained.*

## FRANK E. ORCUTT vs. PAUL R. GAST.

Suffolk. October 17, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Estoppel. Bailment. Attachment.*

Merely entrusting the possession of a chattel to a third person and permitting him to use it for many years do not estop the owner from asserting his title to the chattel against one attaching it as the property of such third person.

TORT against a constable for the alleged conversion of a stamping press, which the defendant attached in an action against the C. A. Orcutt Company, a corporation. Writ in the Municipal Court of the City of Boston dated February 16, 1916.

The evidence at the trial in the Municipal Court and the findings of the judge are described in the opinion. The period during which the press remained in the custody of C. A. Orcutt and the C. A. Orcutt Company, referred to in the opinion as "a long period of time," was about thirteen years. The judge found for the plaintiff in the sum of \$260 and, at the request of the defendant, reported the case to the Appellate Division.

The Appellate Division made an order that the report be dismissed; and the defendant appealed.

*A. E. Yont*, for the defendant.

*E. O. Howard*, for the plaintiff.

CROSBY, J. This is an action brought to recover for the alleged conversion of a stamping press by the defendant, a constable, who attached it by virtue of a writ which issued out of the Municipal Court of the City of Boston, in which F. E. Simpson and others were named as plaintiffs and the C. A. Orcutt Company as defendant.

The judge of the Municipal Court found that the press was purchased by the plaintiff in this action in 1892; that he made the last payment upon it in 1895; that it was used by him as a part of the equipment of a stamping plant carried on by him until he sold the business to his brother, but the press in question was excepted from the sale; that later the plaintiff's brother sold the

business to his son, C. A. Orcutt, and it afterwards was incorporated under the name of the C. A. Orcutt Company.

The judge further found that the plaintiff allowed the press to be used in the business up to the time of the attachment by the defendant; that the plaintiff "was to have access to it [the press] at any time. C. A. Orcutt paid him \$40 for the use of it, and paid for the insurance, it being insured in the name of Frank E. Orcutt up to the time of the attachment;" that in 1906 Charles A. Orcutt mortgaged the property used in the business but excepted therefrom the press in question, and that the ownership in the press remained in the plaintiff.

The judge further found as follows: "I find no reason to believe that the plaintiff in the suit in which the attachment was made extended credit to C. A. Orcutt or the C. A. Orcutt Company because of the presence of the press on the premises. I find that there was no fraud practised by either Frank E. Orcutt, C. A. Orcutt or the C. A. Orcutt Company in the matter of title to this press."

Upon this record it does not appear as matter of law that the plaintiff by his conduct is estopped from asserting his ownership in the property. It is well settled that merely entrusting a third person with the possession of personal property is not holding him out as owner, and creates no estoppel as against the real owner. *Rodliff v. Dallinger*, 141 Mass. 1. *Stiff v. Ashton*, 155 Mass. 130. *Commercial National Bank v. Bemis*, 177 Mass. 95. *Rogers v. Dutton*, 182 Mass. 187, 189. For a collection of cases see 16 Cyc. 773-776.

Although the plaintiff permitted the use of the press in the business for a long period of time, there is nothing in the report sufficient to show that he did, or omitted to do, anything which requires a ruling that he is estopped from asserting his ownership in the property. The cases cited and relied on by the defendant are plainly distinguishable from the case at bar.

As no error of law appears in the report, the entry must be

*Order dismissing report affirmed.*

THOMAS A. POLMATIER vs. NATHAN NEWBURY.

ANNA V. POLMATIER vs. SAME.

Bristol. October 28, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Negligence, Motor vehicle. Motor Vehicle. Evidence, Of acts at other times, Collateral issues.*

In an action for personal injuries sustained from being run into by a motor car owned and driven by the defendant when the plaintiff was riding a motor cycle on a highway, the plaintiff had testified that at the time of the accident he did not have an operator's license to run a motor cycle and was asked on his cross-examination by the defendant, "Did you ever have an operator's license to run a motor cycle?" On objection by the plaintiff the question was excluded. The defendant excepted, and the jury returned a verdict for the plaintiff. *Held*, that the question was excluded rightly, as the issue whether the plaintiff was negligent could be determined only by his conduct at the time the injury occurred, and, if the fact that he never had a license tended to show his previous lack of experience in operating motor vehicles, as was contended by the defendant, this would be immaterial. Following *Lang v. Boston Elevated Railway*, 211 Mass. 492.

In the same case it was *said* that in making the decision stated above the court did not mean to intimate that the question was not excluded properly on the ground, that acts of negligence committed on other occasions than the one in question are inadmissible because they lead to collateral inquiries which would distract the jury from the issue on trial and have no logical tendency to determine it.

TWO ACTIONS OF TORT, the first by the owner of a motor cycle for personal injuries and damage to the motor cycle by reason of being run into by a motor car owned by the defendant and carelessly operated on the wrong side of the road by him on Sunday, July 2, 1916, at about half past nine o'clock in the morning on Winthrop Street, a public highway in Taunton, at or near the corner of Fairview Avenue, and the second action by the wife of the plaintiff in the first action, who was riding with him on the motor cycle, for personal injuries sustained at the same time and place. Writs dated November 18, 1916.

In each of the cases the defendant's answer contained an allegation that the plaintiff's negligence contributed to his or her injuries and the damage to the motor cycle, and the answer in the first case also alleged that the plaintiff was operating a motor vehicle

upon the highway at the time of the alleged injuries without a license and that his inexperience in operating a motor vehicle and his lack of a license were contributing causes of his injury.

In the Superior Court the cases were tried together before *Sanderson, J.* The evidence material to the only exception argued is stated in the opinion. At the close of the evidence the judge in each of the cases refused to rule at the request of the defendant that the plaintiff was not in the exercise of due care or that the defendant was not negligent. He submitted the cases to the jury, who returned a verdict for the plaintiff in each case, in the first action in the sum of \$2,970 and in the second action in the sum of \$500. The defendant alleged exceptions, the only one argued being to the exclusion of a question asked by the defendant in the cross-examination of the plaintiff in the first case as described in the opinion.

The cases were submitted on briefs.

*E. S. White & A. R. White*, for the defendant.

*F. S. Hall & S. P. Hall*, for the plaintiffs.

CROSBY, J. These are two actions brought to recover for personal injuries received by the plaintiffs while riding on a motor cycle, owned and operated by the plaintiff in the first action, and for damage to the motor cycle.

The alleged causes of action arise out of a collision upon a highway in Taunton between the motor cycle and an automobile owned and operated by the defendant. The only exception argued by the defendant is to the exclusion of a question put to the plaintiff in the first action upon cross-examination.

He had previously testified, both upon his direct and cross-examination, that he did not have an operator's license to run the motor cycle at the time of the accident. He then was asked, "Did you ever have an operator's license to run a motor cycle?" This question was objected to and excluded.

The general rule is well settled that acts of negligence committed by a defendant on other occasions than the one in question are held to be inadmissible. The reason for the rule is that such evidence would lead to collateral inquiries which would distract and mislead the jury from the issue on trial, and would have no logical tendency to determine it. *Robinson v. Fitchburg & Worcester Railroad*, 7 Gray, 92. *Tenney v. Tuttle*, 1 Allen, 185.

*Gahagan v. Boston & Lowell Railroad*, 1 Allen, 187. *Lizotte v. New York Central & Hudson River Railroad*, 196 Mass. 519. *Luiz v. Falvey*, 228 Mass. 253.

The defendant contends that the evidence was competent on the ground that, if it appeared that the plaintiff never had been licensed to run a motor cycle, it would be evidence having a tendency to show that he was lacking in experience, skill and fitness properly to manage and control the machine at the time of the accident; and therefore, was evidence to show that at that time he was not in the exercise of due care. We are unable to agree with this contention, as the question of the plaintiff's care could be determined only by his conduct at the time when the accident occurred. If the jury found, upon the facts as shown by the evidence, that his conduct did not contribute to his injury, his previous inexperience would be immaterial.

In *Lang v. Boston Elevated Railway*, 211 Mass. 492, recently decided by this court, it was held that evidence to show the length of time of the employment of and the extent of the instructions given to a motorman in charge of a car which ran into the plaintiff was improperly admitted and had a tendency to be prejudicial to the defendant upon the question of the negligence of the motorman. We regard this case as decisive upon the question of the admissibility of the evidence offered in the case at bar, although we do not mean to intimate that it was not properly excluded in accordance with the rule as stated in *Luiz v. Falvey*, *supra*, and cases therein cited.

As the exception to the admissibility of the evidence above referred to is the only exception argued, the others are treated as waived.

*Exceptions overruled.*

FRANCISCO P. SARMENTO, administrator, vs. BERT A. VANCE.

Bristol. October 28, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, Contributory, Motor vehicle. Evidence, Presumptions and burden of proof.*

A boy sixteen years of age was standing in the street with another boy watching a concrete mixing machine which was being operated. There was a single street railway track in the middle of the street. The mixing machine stood between one of the rails of this track and the curbstone of the sidewalk. The machine had a hopper, which when lowered swung outward about two feet beyond the machine toward the centre of the street. The boy was standing on the street railway track about half way between the rails, facing the machine and a little less than three feet from it, when the hopper was lowered and he stepped back a single step to avoid being struck by it and was struck and killed by a motor car being driven negligently at the rate of about thirty miles an hour and approaching without warning. There was ample space in the highway for the motor car to have passed behind the boy without striking him. In an action against the owner and operator of the car for causing the boy's death, it was *held* that on the facts stated above, which could have been found upon the evidence, it could not be ruled as matter of law that the plaintiff's intestate was negligent.

In the case above described there was no evidence that the intestate looked behind him before stepping back, and it was *said* that, if he did not, his failure to do so would not necessarily be negligence.

In the same case it was *said* that it was not necessary to consider, whether, if the accident had happened before the enactment of St. 1914, c. 553, there would have been evidence to warrant a finding that the intestate was actively in the exercise of due care.

TORT by the administrator of the estate of Manuel G. Goularte for causing the death of the plaintiff's intestate on November 7, 1914, in the manner described in the opinion by running into him almost directly in front of a school house on Globe Street in Fall River where the intestate attended school. Writ dated November 14, 1914.

The defendant's answer contained an allegation that there was contributory negligence on the part of the plaintiff's intestate.

In the Superior Court the case was tried before *Morton, J.* The facts in regard to the conduct of the plaintiff's intestate which could have been found upon the evidence are stated in the opinion.

The bill of exceptions contained the statement, "It is not contended that the evidence would not warrant a finding of want of due care on the part of the defendant." At the close of the evidence the defendant made a motion asking the judge to order a verdict for the defendant on the ground that the evidence would not warrant a finding that the intestate was in the exercise of due care. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$500. The defendant alleged exceptions.

*A. G. Weeks*, for the defendant.

*D. R. Radovsky*, for the plaintiff.

CROSBY, J. The plaintiff's intestate, a boy sixteen years of age, was struck by an automobile owned and operated by the defendant, receiving fatal injuries. This action is brought to recover for his death.

The accident occurred on Globe Street in Fall River on November 7, 1914, at about half past seven o'clock in the morning. A street railway track, running east and west, is laid approximately in the centre of the street; between the southerly rail of the track and the curbing of the southerly sidewalk a concrete mixing machine was being operated at the time of the accident; attached to the machine was an elevator, or hopper, that when lowered swung outward about two feet beyond the machine toward the centre of the street.

There was evidence that for some time before he was struck the intestate, with another boy, was watching the operation of the machine, and stood on the street railway track about half way between the rails, a little less than three feet from the machine; that he was facing it, and that when the hopper came down he stepped back and was struck by the automobile.

The witness Doyle testified that, at the time of the accident, he operated the mixing machine and saw the intestate standing near it; "that the hopper would have hit him if he had not backed up; that the hopper when down reached almost to the car track, and that Goularte backed out far enough to get away from the hopper." There was a conflict in the evidence as to the number of steps backward the intestate took, but it could have been found on the testimony most favorable to the plaintiff that the intestate took but one step back toward the centre of the street before he



was struck by the automobile which, one witness testified, was travelling at the rate of about thirty miles an hour. There also was evidence that no warning signal was given of its approach; and "all testified that the mixer is a noisy machine." The defendant testified that "when within five or six feet of the machine . . . [he] applied his brakes and 'yelled.'"

The defendant concedes that the evidence would warrant a finding that he was negligent, but contends that under St. 1914, c. 553, he has shown affirmatively as matter of law that the fatal injuries received by the intestate were the result of contributory negligence on his part.

While there is no evidence to show that the intestate looked behind him before stepping back, that would not be conclusive on the question of due care even at common law. Upon the evidence most favorable to the plaintiff and the reasonable inferences to be drawn therefrom, including the age of the intestate, it could have been found that his attention was directed to the operation of the machine; that he stepped back a single step when the hopper was lowered, believing he might be near enough to it to be struck, and thinking he could do so without danger of being run over by a passing automobile when he was standing within three feet of the machine and there was ample space in the highway behind him for an automobile to pass without striking him.

Whether before the enactment of St. 1914, c. 553, the evidence would have been sufficient to warrant a finding that the intestate was actively in the exercise of due care need not be determined, as we are satisfied that under the statute it could not have been ruled that the death of the plaintiff's intestate was due to contributory negligence on his part. *Mercier v. Union Street Railway*, 230 Mass. 397. *Bailey v. Worcester Consolidated Street Railway*, 228 Mass. 477. *Creedon v. Galvin*, 226 Mass. 140.

It follows that the entry must be

*Exceptions overruled.*

## JOE DUART vs. LAFOREST L. SIMMONS.

Bristol. October 28, 1918. — November 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Workmen's Compensation Act. Longshoreman. Agency. Negligence, In unloading vessel, Of fellow servant. Practice, Civil, Exceptions, Requests and rulings.*

By St. 1913, c. 568, unchanged by St. 1914, c. 708, § 13, amending § 2 of Part V of the workmen's compensation act by excepting from the operation of that act "masters of and seamen on vessels engaged in interstate or foreign commerce," a longshoreman employed to shovel coal in discharging the cargo of a schooner engaged in interstate commerce is not included in the exception made by the act itself.

A longshoreman who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters has received a maritime injury in maritime work and, under the decision of the Supreme Court of the United States in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the provisions of the workmen's compensation act do not apply to him, the effect of such injuries being within the exclusive admiralty and maritime jurisdiction of the United States under art. 3, § 2, of the Constitution of the United States and the Judicial Code U. S. St. 1911, c. 231, 36 U. S. Sts. at Large, 1161, § 256, cl. 3.

Consequently, where a longshoreman was injured when in the employ of an independent contractor, who had agreed with the proprietor of a schooner engaged in carrying coal from State to State to unload a cargo of coal from the hold of the schooner when lying in navigable waters, and where such proprietor of the schooner was a subscriber under the workmen's compensation act, in an action by the longshoreman against the proprietor of the schooner for his injuries the defendant cannot set up in defence, that the plaintiff has waived his right of action at common law by having failed to give notice under St. 1911, c. 751, Part I, § 5, that he claimed his right of action at common law, because the workmen's compensation act has no application to an action for such a maritime injury and the action must be governed wholly by the common law.

Discussion by Rugg, C. J., of the character of the workmen's compensation act contained in St. 1911, c. 751, and amendments thereto.

In such an action at common law brought by a longshoreman injured in the manner above described there was evidence of his due care in addition to the presumption created by St. 1914, c. 553, and it was *held* that the question, whether the defendant had shown that negligence of the plaintiff contributed to his injury, was for the jury.

In such an action the defendant is responsible for the negligence of his own servants, who were not the fellow servants of the plaintiff because the plaintiff was in the employ of the independent contractor and not of the defendant.

In the same action it was *said* that the defendant would not have been liable for

the negligence of the fellow servants of the plaintiff who were employed by the independent contractor, but there was no evidence of any negligence of such servants contributing to the plaintiff's injury.

A request for an instruction to the jury stating a sound principle of law which is not applicable to the evidence is refused properly.

In the same action it was *held* that there was no error in refusing to make rulings to the effect that the defendant was not responsible, if the rope whose parting caused a tub of coal to fall on the plaintiff was purchased from a reputable dealer and gave way because of a hidden flaw after being used a few times, because it appeared by the defendant's own testimony that he had owned the rope for about six months and had used it for unloading a cargo of coal before the cargo for which it was being used at the time of the accident, and the instructions given by the judge upon this point could not be said to have been insufficient under all the circumstances.

TORT by a longshoreman, employed by one Davis, an independent contractor, for personal injuries sustained on April 20, 1915, while shovelling coal in unloading a schooner, lying at the defendant's wharf and coal yards on the Taunton River in the town of Somerset, which was used by the defendant to bring coal from the State of New Jersey to his wharf. Writ dated July 23, 1915.

The defendant's amended answer contained an allegation that the negligence of the plaintiff contributed to his alleged injury and also contained the following paragraph:

"And the defendant further answering says that he was a 'subscriber' under the workmen's compensation act, so called, at the time of the alleged injury, and that he had entered into an oral contract with an independent contractor to do certain of said defendant's work, which was a part of the business carried on by the defendant, that said plaintiff was an employee of said independent contractor, that the alleged injury occurred on, in or about the premises on which the contractor had undertaken to execute the work for the subscriber, the defendant, or which was under the control or management of the subscriber, the defendant, that said plaintiff waived his right of action at common law to recover damages for personal injuries by not having given the plaintiff [defendant], at the time of his contract of hire, notice in writing that he claimed such right, but that said plaintiff is entitled to compensation under the terms of the workmen's compensation act." See St. 1911, c. 751, Part III, § 17.

In the Superior Court the case was tried before *Dubucque, J.* It appeared that the defendant had made an oral contract with

Davis to have the coal in the hold of the schooner shovelled into tubs, and the tubs then were hoisted by the defendant's servants, that the tubs were raised by means of a rope, that on the morning of the accident the plaintiff had filled one of the tubs, and had just stepped back and to one side, when the rope broke and the tub filled with coal and weighing about six hundred pounds came down and struck the plaintiff a glancing blow on his back, injuring his spine, and there was conflicting evidence as to whether or not he was permanently disabled for work. Other material facts are stated in the opinion. At the close of the evidence the defendant made a motion asking the judge to order a verdict for him. The judge denied the motion. The defendant thereupon asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff was not in the exercise of due care.

"2. Upon all the evidence the defendant was not negligent."

"5. Upon all the evidence Laforest L. Simmons was a subscriber under the workmen's compensation act, so called, at the time of the alleged injury, and that he had entered into an oral contract with Joe Davis, an independent contractor, to do certain of said defendant's work, which was a part of the business carried on by the defendant, that said plaintiff was an employee of said independent contractor, that the alleged injury occurred on, in or about the premises on which the contractor had undertaken to execute the work for the subscriber, the defendant, or which was under the control or management of the subscriber, the defendant, that said plaintiff waived his right of action at common law to recover damages for personal injuries by not having given the plaintiff [defendant] at the time of his contract of hire notice in writing that he claimed such right.

"6. If the jury finds that the defendant furnished suitable ropes and appliances and put a competent man in charge of them, then the jury must find for the defendant.

"7. If the jury finds that the rope in question was purchased from a reputable maker and was the best rope made for the use intended, but which broke on account of a hidden flaw after using the same properly a few times, where the rope ordinarily lasts for years, then the defendant is not liable.

"8. If the jury finds that the rope broke solely as a result of

the negligence of a fellow servant, then the plaintiff cannot recover."

"10. If the jury finds that the rope became chafed just prior to the accident and that the defendant could not have discovered the chafing, in the exercise of a reasonable supervision or inspection, then the defendant is not negligent.

"11. If the jury finds that the defendant furnished suitable ropes and appliances and put competent men in charge of the work, and that the rope broke because of some hidden flaw, or because of recent chafing that the defendant could not have discovered, by reasonable inspection or by negligence of a fellow servant, then the defendant cannot be found to have been negligent, and the verdict must be for the defendant.

"12. The Massachusetts workmen's compensation act does not affect the uniformity in respect to maritime matters or freedom of navigation, between the States, because it is not compulsory on either employers of labor or employees who may elect to reserve their common law rights."

The judge refused to make any of these rulings and submitted the case to the jury. The beginning of his charge was as follows:

"This is the case of Joe Duarte against Laforest L. Simmons, an action brought at common law to recover damages for an injury which he suffered in unloading a coal barge in Somerset.

"At the outset I want to say to you that the defendant offered to show that he was a subscriber under the Massachusetts workmen's compensation act, and I ruled that the Massachusetts workmen's compensation act did not apply under the authority of a decision of the United States Supreme Court made in May, 1917, in the case of Southern Pacific Company against Marie Jensen, and cases following it, where it was decided in a case of this kind a State workmen's compensation act does not apply. So that this case is brought at common law, and the common law principles apply to the determination of this case as our Supreme Judicial Court has applied them in the case of Ford against the Allen Line Steamship Co., Limited, reported in 227 Mass. 109, and decided also in May, 1917.

"The plaintiff in order to recover in a case of this kind has got to show that he himself was in the exercise of due care; that the defendant was negligent, and that he suffered an injury in conse-

quence of the accident which arose out of the negligence of the defendant, or the negligence of those employed by him. A man is responsible for his own carelessness, and he is responsible for the carelessness of his servants or agents. He is responsible for carelessness in furnishing appliances to work, or in operating those appliances by his workmen, if the workmen are guilty of negligence in so operating them.

"As to the due care on the part of the plaintiff, St. 1914, c. 553, says, that when he is injured and sues for a personal injury he is presumed to be in the exercise of due care, and the burden of proof that he was not in the exercise of due care is upon the defendant, the man he has sued. So in this case the burden would be upon the defendant Simmons to show that the plaintiff himself by his own want of due care contributed to the injury."

The jury returned a verdict for the plaintiff in the sum of \$10,250; and the defendant alleged exceptions.

*E. S. White*, for the defendant.

*D. R. Radowsky*, for the plaintiff.

Rugg, C. J. The plaintiff received injuries in the course of his employment by one Davis, who by an independent contract furnished the plaintiff and two other laborers to the defendant for work in shovelling coal in the hold of a schooner tied up at the defendant's wharf. The contract of Davis as independent contractor was for the performance of a part of the business carried on by the defendant on his own premises. The defendant was a subscriber under the workmen's compensation act. St. 1911, c. 751. The plaintiff's employer, Davis, was not a subscriber under that act. It is urged that the plaintiff is confined to the remedies afforded by the act. Its terms are broad enough to include an employee such as was the plaintiff, working in connection with the discharge of the cargo of a vessel engaged in interstate or foreign commerce. In this connection only "masters of and seamen on vessels engaged in interstate and foreign commerce" are excluded expressly from the operation of our act by its terms. St. 1913, c. 568. *Morrison v. Commercial Tow Boat Co.* 227 Mass. 237.

The accident occurred in the course of the employment of the plaintiff in the discharge of a cargo of coal from a vessel engaged in interstate commerce while she was lying in navigable waters.

His work and his injury were maritime in their nature. *Atlantic Transport Co. v. Improbek*, 234 U. S. 52, 59, 60. *Clyde Steamship Co. v. Walker*, 244 U. S. 255. By art. 3, § 2, of the Constitution of the United States, the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." The Judicial Code of the United States, act of March 3, 1911, c. 231, 36 U. S. Sts. at Large, 1161, by § 256, cl. 3, vests exclusive jurisdiction in the federal courts "Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." It was decided in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, that the compulsory workmen's compensation act of New York was unconstitutional so far as its terms applied to maritime injuries. It is earnestly argued that the case at bar is distinguishable from the Jensen case. The grounds urged are that our act is permissive and not mandatory, as was the New York law. Under our act it is elective both with the employee and likewise with the employer whether they shall become subject to its terms. An employer, who chooses to become a subscriber under our act, is liable to the employees of his subcontractor situated with reference to his work as was the plaintiff. He has elected so to become liable. The plaintiff as employee of the subcontractor, by failing to give notice to the employer as required by Part I, § 5, of the act, has decided to become bound by the act and to waive his common law right. *White v. George A. Fuller Co.* 226 Mass. 1. *Young v. Duncan*, 218 Mass. 346. These are the cogent arguments put forward in behalf of the defendant.

The workmen's compensation act (except in Part I) is not an amendment to the common law, but the establishment of heretofore unknown obligations, compensations and methods of procedure, all differing from and in place of those afforded by the common law. The general purpose of the act was to substitute, in cases to which it is applicable, for common law or statutory rights of action and grounds of liability, a system of money payments based upon the loss of wages by way of relief for workers receiving injury in the course of and arising out of their employment. As stated in the Report of the Massachusetts Commission on Compensation for Industrial Accidents submitted in 1912,

which framed the act adopted by the Legislature (without change except in Part V, § 3, whereby all liability insurance companies were granted the same privileges as the Massachusetts Employees' Association in the matter of insuring), at page 46: "The Massachusetts law may be briefly characterized as an elective compensation insurance law giving compensation for all injuries arising out of employment irrespective of negligence except those due to the serious and wilful misconduct of the injured employee. The basic principle of the act is that the cost of injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view." The payments provided by the act are founded simply upon such injury and are entirely disconnected with any theory of fault on the part of the employer or right on the part of the employee established by law before the passage of the act save in instances of "serious and wilful misconduct." With this single exception, considerations of fault, negligence, tort or due care are excluded from proceedings under the act. The amounts of such payments bear relation to the amount of wages received by the employee, are to be determined speedily and are to be paid commencing forthwith, and ordinarily are to be continued in small instalments regularly during a given period with the privilege of commutation by a single payment under certain restrictions. All payments are by way of financial relief for inability to earn wages, or for deprivation of support flowing from wages theretofore received. The word "compensation" in the connection in which it is used in the act, means the money relief afforded according to the scale established and for the persons designated by the act, and not the compensatory damages recoverable in an action at law for a wrong done or contract broken.

The ground of the Jensen decision as we understand it is that the kind of legislation represented by workmen's compensation acts is beyond the jurisdiction of the States so far as it relates to admiralty and maritime affairs. The reasoning of that decision seems to us to apply equally to an elective as to a compulsory workmen's compensation act. Consent of parties cannot confer jurisdiction. A statute which in its nature is outside the jurisdiction of the State because within the exclusive domain of the federal government, cannot confer rights or be a bar to the en-



forcement of common law obligations. This question never before has been raised as to our act, and in several instances without discussion its provisions have been enforced as to maritime injuries. *Brightman's Case*, 220 Mass. 17. *McManaman's Case*, 224 Mass. 554. See *Gillen's Case*, 215 Mass. 96. These cases arose, however, before the decision of the Jensen case. Although our act is constitutional in its general aspects, both under the State and Federal Constitution, *Young v. Duncan*, 218 Mass. 346, *Hawkins v. Bleakly*, 243 U. S. 210, we feel constrained by the controlling authority of the Jensen case to hold that it does not apply to injuries having a maritime origin. A similar conclusion has been reached for the same reason by the Supreme Court of Wisconsin with regard to the workmen's compensation law of that State, which in respect of being optional and not compulsory resembles our own act. *Neff v. Industrial Commission of Wisconsin*, 166 Wis. 126. Seemingly the exclusive nature of the federal jurisdiction has been released as to cases of this sort occurring since October 6, 1917, by 40 U. S. Sts. at Large, c. 97, § 2, approved on that date, amending the Judicial Code of the United States, § 256, St. of March 3, 1911, c. 231; 36 U. S. Sts. at Large, 1161. It follows in our opinion that, by reason of the decision in the Jensen case, the plaintiff's rights and the defendant's obligations must be determined according to the common law.

There was evidence of the plaintiff's due care. Whether he moved with adequate alacrity away from under the hatch and with sufficient vigilance for his own safety watched the tub of coal were questions of fact to be decided in the light of his explicit testimony and the fall of the tub of coal and his consequent injury.

The defendant, in view of the evidence, hardly can contend that the plaintiff was a servant of the defendant and that hence the fellow servant defence will avail. The plaintiff was employed by Davis, who contracted with the defendant to unload the coal from the schooner at a given price per ton. Although all the other men at work in connection with the discharge of the cargo, except the plaintiff and his two companions who shovelled the coal into the tubs in the hold of the schooner, were employed by the defendant, and all the appliances were furnished by him, the plaintiff does not appear to have been working under the direction of

the defendant or his servants. The plaintiff therefore can recover for injuries sustained by him through the negligence of the servants of the defendant while acting within the scope of their employment. *Hooe v. Boston & Northern Street Railway*, 187 Mass. 67. *McLellan v. Boston & Maine Railroad*, 212 Mass. 153.

The defendant was not responsible for the conduct of the servants of Davis, the independent contractor. If the plaintiff's injuries resulted from their negligence, he cannot recover from the defendant. The trial does not appear to have proceeded on the theory that the plaintiff sustained injury from the negligence of his fellow employees. A careful perusal of the record fails to disclose any conduct on their part contributing to the injury of the plaintiff. The jury were instructed with adequate amplification that the plaintiff would be entitled to a verdict only by showing that his injury was the consequence of the negligence of the defendant or of those employed by him. Upon this state of the evidence that was enough. It was unnecessary to state further that the plaintiff could not recover if injured through the negligence of a fellow servant. A request for instruction to the jury respecting a sound principle of law not applicable to the evidence is denied rightly.

There was no error in denying the requests to the effect that the defendant was not responsible if the rope, (whose parting permitted the fall of the tub upon the plaintiff,) was purchased from a reputable maker and gave way because of a hidden flaw after being used a few times. On the defendant's own testimony, he had owned the rope for about six months and had used it for unloading one cargo of coal before the one on which it was being used at the time of the accident. The instructions given upon this point cannot be pronounced insufficient under all the circumstances.

*Exceptions overruled.*

## ANDREW SHANNON &amp; others vs. MAYOR OF CAMBRIDGE &amp; others.

Suffolk. November 14, 1918. — November 26, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, &amp; CARROLL, JJ.

*Municipal Corporations, Municipal indebtedness act. Cambridge. Mandamus.*

The mayor, the superintendent of streets and the auditor of a city that has adopted the Plan B form of government provided for in St. 1915, c. 267, Part III, subject to St. 1913, c. 719, called the municipal indebtedness act, are right in refusing to approve the alleged wages of certain city laborers claimed by them under an ordinance attempted to be passed by the city council raising the rate of the wages of the classes of laborers in question beyond the amount provided for by the budget for the fiscal year in violation of § 20 of the municipal indebtedness act.

In a petition by certain laborers in the employ of the city of Cambridge for a writ of mandamus to compel the mayor, the superintendent of streets and the auditor of that city to certify to the city treasurer the wages of the petitioners at an increased rate attempted to be established by an ordinance passed by the city council of that city in violation of the provisions of the municipal indebtedness act contained in St. 1913, c. 719, § 20, it was said that, as the petition must be dismissed, it was not necessary to consider whether, if the petitioners had been entitled to the wages claimed by them, they could have sued for such wages in actions of contract so that they would not have needed, nor have been entitled to, the writ of mandamus sought.

PETITION, filed on December 10, 1917, by six persons employed as laborers in the street department of the city of Cambridge, for a writ of mandamus directed to the mayor, the superintendent of streets and the auditor of that city commanding them to certify the names of the petitioners to the city treasurer for the payment of wages at the minimum rate of \$3 a day as established by an ordinance alleged to have been passed by the city council over the veto of the mayor on June 12, 1917.

The answer of the respondents set up the invalidity of the alleged ordinance and also alleged, among other matters, that the petitioners, if entitled to their alleged wages, had a plain and adequate remedy by actions at law and that there was no occasion for the exercise of the extraordinary jurisdiction of the court by issuing its writ of mandamus.

The case was submitted upon the petition, the answer and an

agreed statement of facts to *De Courcy*, J., who, at the request of the parties, reserved it for determination by the full court.

The case was submitted on briefs.

*J. F. Cavanagh & P. A. Hendrick*, for the petitioners.

*P. J. Nelligan & G. H. McDermott*, for the respondents.

BRALEY, J. The petitioners, five of whom work in the sanitary division and one in the maintenance division of the street department, are employees of the city of Cambridge.

We assume on the record that unless the respondents, who at the date of filing the petition were respectively the mayor, the superintendent of the street department and the auditor, certified their names with the amount due to the city treasurer, the petitioners could not obtain their wages. The refusal of the respondents to make the necessary certification depends upon the validity of the ordinance enacted by the city council which established a minimum amount for each day's work. The amended city charter is found in St. 1891, c. 364. But the qualified voters having lawfully adopted "Plan B" as provided in St. 1915, c. 267, Part III, the powers of government under § 2 were to be exercised as "prescribed herein and in Part I." Section 8 of Part III relating to the mayor's approval or veto of every order, ordinance, resolution and vote relating to the affairs of the city passed or adopted by the city council, closes with these words: "Nothing in this section contained shall be construed as superseding or in any way affecting any provision of chapter seven hundred and nineteen of the acts of the year nineteen hundred and thirteen." The statute referred to is entitled an act relative to municipal indebtedness, and the city of Cambridge is subject to its provisions.

It appears that when the ordinance in question was passed an appropriation for laborers, among whom the petitioners are to be classed, had been duly made in the budget for the fiscal year as required by St. 1913, c. 719, § 20, as amended by St. 1915, c. 138, which specifically provided for the rate of wages as well as the number of days with the amount to be expended; and if the increase created by the ordinance is disbursed the appropriation will be insufficient to maintain the department and a deficit results. The ordinance under such conditions comes directly within the prohibition of St. 1891, c. 364, § 35, that ". . . No expenditures shall be made and no liabilities shall be incurred or be binding

upon the city for any purpose beyond the appropriation previously made therefor . . . .” Whatever the provisions of St. 1891, c. 364, as amended by St. 1896, c. 173, relating to the delegated legislative powers of the city council may be, it is plain that an ordinance cannot be legally enacted which overrides the express provisions of a subsequent statute to which the city expressly has been made subject. *Flood v. Hodges*, ante, 252.

It follows that, the ordinance being invalid, the respondents rightly refused to approve the payroll, and, as the petition must be dismissed, there is no occasion to consider the question raised in the answer, that the petitioners could have sued the city in actions of contract to recover their wages.

*Petition dismissed.*

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MORRIS HOFFMAN vs. CHARLESTOWN FIVE CENTS SAVINGS  
BANK.

Suffolk. November 20, 1918. — November 26, 1918.

Present: LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Soldiers' and Sailors' Civil Relief Act. Agency. Waiver. Frauds, Statute of, R. L. c. 74, § 1, cl. 4, c. 147, § 1. Trust, Oral. Equity Jurisdiction, To foreclose mortgage. Mortgage, Of real estate.*

The benefit of the provision of the soldiers' and sailors' civil relief act contained in § 302 of U. S. St. 1918, c. 20, is not limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes.

Under U. S. St. 1918, c. 20, § 302, cl. 3, no sale of land under a power of sale in a mortgage is valid if made during the military service of the owner of the land or within three months thereafter unless such sale is ordered by a court.

The fact, that an agent of a person in the military service of the United States, who had charge of the land beneficially owned by such person subject to a mortgage, had full knowledge of the foreclosure sale and acquiesced in and actively approved of it, does not deprive such military owner of his right given by U. S. St. 1918, c. 20, § 302, because the right is a personal one which cannot be waived by an agent.

The defence that an oral contract for a sale of land or an interest therein or an oral trust concerning land is within the statute of frauds under R. L. c. 74, § 1, cl. 4, or R. L. c. 147, § 1, cannot be set up by a third person, the statute of frauds being a defence only to the parties to the contract, which they are not obliged to set up unless they choose to do so.

Assuming that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a mortgage of real estate containing a power

of sale, the existence of the soldiers' and sailors' civil relief act is a special circumstance which gives the courts of equity in this Commonwealth jurisdiction to foreclose such mortgages made within the time specified in the act.

There is no question of the constitutionality of U. S. St. 1918, c. 20, called the soldiers' and sailors' civil relief act, it being a war measure within the power of Congress and therefore the supreme law of the land governing the foreclosure of mortgages of real estate within the territorial limits of the Commonwealth.

BILL IN EQUITY, filed in the Superior Court on May 28, 1918, alleging that the plaintiff was a first lieutenant in the United States Army stationed at the United States Army Hospital at Ellis Island in the city of New York in the State of New York, that on November 22, 1917, the plaintiff was the holder of a mortgage made by one Abraham Cheren upon certain land and the buildings thereon on Hancock Street and on Joy Street in Boston, that the premises were subject to a prior mortgage for \$18,000 held by the defendant, the Charlestown Five Cents Savings Bank, that on January 31, 1917, the plaintiff for a breach of condition in the mortgage held by him sold the premises at public auction under the terms of his mortgage, that the plaintiff, having received his appointment to the United States Army, not knowing the exact date of his being called to the army and knowing the uncertainty of life, caused the premises to be conveyed to the plaintiff's mother, Bessie Hoffman, who at the time of the filing of the bill was the holder of the property for the benefit of the plaintiff, that the interest on the prior mortgage held by the defendant would come due on July 29, 1918, and on information and belief alleging that, while the plaintiff was absent in New York in the service of the United States Army, the defendant, without notice to the plaintiff and when there was no breach of condition of the mortgage held by the defendant, took possession of the premises and advertised them to be sold at foreclosure on Monday, May 27, 1918, at three o'clock in the afternoon, at which time and without notice to the plaintiff the premises were sold to some person unknown to the plaintiff, and that the defendant conspired with divers persons unknown to the plaintiff to deprive the plaintiff by fraud of his rights in such real estate. The prayers of the bill were (1) that the defendant be enjoined and restrained from proceeding further with the foreclosure of the mortgage, (2) that the defendant be enjoined and restrained from placing on record in the Suffolk registry of deeds any papers affecting the title

to the premises, (3) that the defendant be ordered to vacate its possession of the premises, (4) that the defendant be ordered to account for any and all rents collected by the defendant, and (5) for further relief.

The case was referred to a master, who filed a report containing the findings that are stated in the opinion. The plaintiff filed two objections to the master's report, in regard to the first of which the master at the conclusion of his report made the following statement: "The first objection states that the master rules, 'As a matter of law that the United States act of Congress approved by the President on March 8, 1918, does not apply to the plaintiff.' I have made no such ruling. My ruling is that on the facts found the act apparently does not apply, but that the matter as to whether it does or does not apply and as to whether the plaintiff is on the facts found entitled to any relief is a matter for the court rather than for the master."

The plaintiff filed an exception to the master's report "in that the master refuses to rule as a matter of law, that the United States act of Congress, approved by the President on March 8, 1918, does not apply to the plaintiff."

The case was heard by *Jenney, J.*, who made an interlocutory decree overruling the plaintiff's exception to the master's report and ordering that the report of the master be confirmed. Later the same judge made a final decree that the bill be dismissed; and the plaintiff appealed.

Section 302 of U. S. St. 1918, c. 20, approved March 8, 1918, is as follows:

"(1) That the provisions of this section shall apply only to obligations originating prior to the date of approval of this act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

"(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in

military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service —

(a) Stay the proceedings as provided in this act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

“(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.”

*J. P. Williams*, for the plaintiff.

*E. W. Bancroft*, for the defendant.

LORING, J. This is a bill brought in behalf of an officer in the military service of the United States outside the Commonwealth to get relief from the foreclosure of a mortgage made in violation of § 302, cl. 3 of U. S. St. 1918, c. 20, (40 U. S. Sts. at Large, 444,) entitled the soldiers' and sailors' civil relief act, which was approved on March 8, 1918.

The case was sent to a master. From his report it appears that, “expecting to be called for service in the army,” the plaintiff by the foreclosure of a third mortgage conveyed the land and buildings here in question to his mother subject to a first mortgage to the defendant as well as to a second mortgage to a third person. Thereafter it was agreed between the plaintiff and his mother by “an oral trust and general agreement” that the property should be his unless he failed to return from the war and in that case it should be hers. Within a month the plaintiff received orders to report for active duty on March 8, 1918. On that day he did report and has been on active duty since that time as a lieutenant in the United States Army.

The defendant's first contention is that § 302 here in question is “limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes.” But there is no such limitation in that section. The contention is based on a note made by persons who assisted in making the draft of the bill which resulted in the act here in question, see Special April Number, 1918,



of the Massachusetts Law Quarterly at page 212. It would seem from this note that the original draft of § 302 contained such a limitation. But after the bill was introduced in the House of Representatives the Judiciary Committee "produced a new bill." See Massachusetts Law Quarterly, *ubi supra*, at page 204. The explanation would seem to be that the note which applied to the draft has been published as a note to the act and the limitation in question never became a part of the section as it was enacted.

The next contention of the defendant is based upon a finding of the master, that the bank had no notice or reason to suppose that the plaintiff was the owner of the property in question. There is nothing in the section here in question which limits its provisions to owners of record or to cases where the mortgagee in fact knew or had reason to know who the owner of the property was. The act in terms includes every case where the mortgaged property is "owned by a person in military service at the commencement of the period of the military service and [is] still so owned by him." If the section is construed to apply in every case where the owner is in the military service of the United States whether the mortgagee did or did not know who the owner was, it would seem on the face of it to be a drastic statute. The fact of the owner (when he is ascertained) being or not being in the military service of the United States is a fact which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is. Yet without question there is no such limitation as to that fact. When the relief given by clause 3 of § 302 is taken into account the section construed as stated above is not a drastic one. The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) "unless [the sale under the power is made] upon an order of sale previously granted by the court and a return thereto made and approved by the court." Clause 3 of § 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section, that if that be the true construction of it the result is that until the termination of the time specified in

the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion, that since this is the result of the true construction of the act, this must be taken to have been the intention of Congress.

The next contention of the defendant is that on the findings of the master the father of the plaintiff, who was the plaintiff's agent in the care of the property in question, had full knowledge of the foreclosure sale and acquiesced in and in fact approved of it. The protection given by the act is given to the person in the military service of the United States. The right given to him is personal to him. For that reason the knowledge, acquiescence and approval of the plaintiff's agent for the care of the property is of no consequence.

There are three matters which ought not to be passed by, although they have not been referred to in argument.

The act applies to persons in the military service of the United States who are equitable as well as to those who are legal owners of property covered by mortgages within the act. The plaintiff was the equitable owner of the property here in question although the trust and agreement which brought his equitable ownership into being was within the statute of frauds (R. L. c. 74, § 1, cl. 4, and R. L. c. 147, § 1), and the statute of frauds was not satisfied. The defence of the statute of frauds is a defence which is personal to the maker of the contract and cannot be set up by a third person. *Cahill v. Bigelow*, 18 Pick. 369. *Ames v. Jackson*, 115 Mass. 508. *Bullard v. Smith*, 139 Mass. 492, 498. *Bailey v. Wood*, 211 Mass. 37. As against third persons a contract within the statute of frauds is effective although the statute is not satisfied.

If it is to be taken that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a power of sale mortgage (see *Old Colony Trust Co. v. Great White Spirit Co.* 178 Mass. 92), the existence of the soldiers' and sailors' civil relief act is a special circumstance which is sufficient to give the equity courts of the Commonwealth jurisdiction to foreclose such mortgages within the time specified in the act.

There can be no question of the constitutionality of the act. It is a war measure within the power of Congress, therefore the supreme law of the land. For this reason it governs the foreclosure of mortgages on real estate within the territorial limits of the Commonwealth.

The decree appealed from must be reversed and a decree entered enjoining the defendant from conveying the property covered by the mortgage here in question to the person who bought it at the attempted foreclosure sale set forth in the bill. The plaintiff is entitled to his costs.

*Decree accordingly.*

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ALICE M. SCHMIDT vs. ANDREW P. ACKERT & trustees.

Hampden. October 14, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Sale, Conditional. Election. Contract, In writing, Implied in law.*

Where chattels were sold under a contract of conditional sale calling for a total payment of \$4,000, the title to remain in the seller until payment had been made in full, and where, after instalments had been paid amounting to \$2,288.63, the buyer made default in the payment of the remaining notes and the seller took possession by an action of replevin of what was left of the property in the hands of the buyer, this was an election by the seller to treat the transaction as no sale, and he cannot afterwards maintain an action of contract for the balance of the purchase money.

Where the buyer under a contract in writing for the conditional sale of chattels after a partial payment of instalments of the purchase money makes default and the seller takes possession of the chattels under the terms of the contract, the seller cannot maintain an action against the buyer to recover the value of the buyer's use of the chattels while in his possession in excess of the payments made by him, the rights of the parties being defined by their express contract in writing and there being no basis for such an implied contract to pay for the use of the chattels.

- CONTRACT to recover a balance alleged to be due on a sale to the defendant, by the plaintiff's husband and through a third person the plaintiff's assignor of certain livery stable property and equipment for \$4,000, the defendant being credited with payments amounting to \$2,288.63, and to recover also compen-

sation for the use of the plaintiff's property by the defendant. Writ dated November 25, 1914.

The declaration contained two counts, the first for the amount alleged to be due on certain unpaid promissory notes amounting to \$1,711.37, and the second count to recover for the value of the use of the plaintiff's property by the defendant while in the defendant's possession in excess of all payments made by the defendant, the excess of such value being alleged to be \$1,211.37.

The defendant demurred to the declaration alleging as causes for demurrer the following:

"Count 1.

"1. Because the plaintiff, having elected to obtain the property itself through replevin on account of default in the terms of the agreement, cannot through a contract action obtain the amount due by the terms of the agreement and represented by promissory notes from the date of the said agreement to the time of the replevin action.

"Count 2.

"1. Because the plaintiff, having elected to obtain the property itself through replevin on account of default in the terms of the agreement, cannot, through a contract action obtain a fair and reasonable value for the use of said property over and above all payments made under said agreement from the date of said agreement to the time of the replevin action."

The case was argued on the demurrer before *Hamilton, J.*, who made an order overruling the demurrer. The defendant appealed.

The defendant filed an answer containing a general denial and an allegation of payment, and the case was tried before *Jenney, J.* The facts which appeared in evidence are stated in the opinion. At the close of the evidence the plaintiff asked the judge to make the following rulings:

"1. Under the pleadings and evidence, the plaintiff is entitled to judgment under the first count of the amended declaration for the difference between the rental value of the property in question accrued before the retaking of property on replevin and the agreed amount of the defendant's payments, namely, \$2,288.63.

"2. Under the pleadings and evidence, the plaintiff is entitled to a verdict under the second count of the amended declaration

for the difference between the fair and reasonable value of the use of the property conditionally sold for the time that the defendant had possession of it, and the agreed amount of the defendant's payments, namely, \$2,288.63.

"3. Under the pleadings and evidence the retaking by the plaintiff on replevin of a portion of the property in question does not as to the portion so retaken constitute such an election as to bar the recovery of such of the rental instalments as had accrued and become due and payable prior to the time of said retaking.

"4. Under the pleadings and evidence the retaking by the plaintiff on replevin of a portion of the property in question, does not constitute such an election as to bar the recovery of the reasonable value of the defendant's use and occupation of the chattels in question during the period of his use of them reduced by the amount of his total payments.

"5. Under the pleadings and evidence the plaintiff is entitled to judgment for the fair and reasonable value of the use of such portion of the property in question as was never returned or taken on replevin to the date of the writ in this action."

The judge refused to make any of these rulings and found for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

*A. L. Green & F. F. Bennett*, for the plaintiff.

*R. J. Morrissey & J. L. Gray*, for the defendant.

DE COURCY, J. In substance the agreement between the plaintiff's assignor and the defendant contemplated the sale of horses, carriages and other livery stable property and equipment for the sum of \$4,000. Five hundred dollars was to be paid at the time of the sale, November 2, 1911, and the balance in monthly instalments of \$140, according to certain promissory notes given by the defendant. On the payment of the full amount the goods and chattels were to become the absolute property of the defendant. Although framed in the language of a lease, the contract plainly was one of conditional sale. *Hurnanen v. Nicksa*, 228 Mass. 346, 349, and cases cited.

On the maturity of any note except the last, the plaintiff might have brought suit upon such overdue note, and still have retained the legal title to the property. *Haynes v. Temple*, 198 Mass. 372. When the last note became due, on December 2, 1913, the plaintiff

had the choice of two remedies. She could then treat the sale to Ackert as an absolute one, and sue him for the unpaid purchase money, or she could reclaim the property as her own, and in accordance with the express provision of this agreement, retain the instalments already paid, amounting to \$2,288.63. But she could not pursue both these inconsistent remedies. As matter of fact, on or about April 1, 1914, she repossessed herself of what was left of the property, by an action of replevin. Having thereby elected to treat the transaction as no sale, she is now debarred from collecting the purchase price in full, as she might have done if she had elected to treat the transaction as a valid and absolute sale. *Bailey v. Hervey*, 135 Mass. 172. *Whitney v. Abbott*, 191 Mass. 59. *Frisch v. Wells*, 200 Mass. 429.

The rights of the parties are defined by their express written agreement; there is therefore no basis for the claim of rental value under the second count. The parties have not argued the demurrer, as the issues raised thereby were also raised by the exceptions.

*Exceptions overruled.*  
*Appeal dismissed.*

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THOR WARNER vs. WALTER E. BROWN & others.

Suffolk. October 14, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Agency*, Scope of authority, Construction of power of attorney, Reliance on authority in writing. *Evidence*, Extrinsic affecting writings. *Equity Pleading and Practice*, Incompetent evidence not affecting result.

In determining the character and extent of the authority given by a power of attorney, it is permissible to examine all the circumstances under which the instrument was executed, so far as those circumstances were actually or presumably present in the minds of the parties, for the purpose of enabling the court to understand the situation of the parties and to apply their words to the right subject matter in the light of all the attendant conditions, and for this purpose oral evidence is admissible.

In a suit in equity to enforce an alleged right of the plaintiff to have made to him a transfer of certain shares of mining stock, the defendants relied on a transfer of the beneficial interest in the shares purporting to be made by a business associate of the plaintiff under the authority contained in a power of attorney executed by the plaintiff. The shares alleged to have been transferred under

the power were of the capital stock of a mining company incorporated under the laws of the State of Maine and having a place of business in Boston, which was organized for the purchase and operation of mines and mining interests in the State of Nevada. The mining company was in financial difficulties. The plaintiff's associate, made attorney, had begun an action against the mining company in his own name, of which the plaintiff knew, and was at the time of the execution of the power of attorney in conference with the attorney of the mining company about the settlement of his claims and those of the plaintiff. Neither the plaintiff nor his associate to whom the power of attorney was made held any shares of the mining company in his own name but each of them was the beneficial owner of shares of the stock held by a trustee under a pooling agreement. The plaintiff had no property in the State of Nevada except that connected with the mining venture in which he and his associate, made attorney, had the beneficial interests mentioned above. The power of attorney was filled in upon a printed blank and was executed by the plaintiff in the Dominion of Canada, where he then was living. So far as concerned shares of stock the power of attorney authorized the attorney to demand and receive sums due the plaintiff "for or in respect of any shares, stock or interest, which I may now or hereafter hold in any Joint Stock or incorporated Company," and "to sell and absolutely dispose of . . . such shares, stocks . . . and others securities for money as are hereinbefore mentioned, . . . and generally to act in relation to my estate and effects, real and personal, as fully and effectually, in all respects, as I could do if personally present." Then followed in the handwriting of the plaintiff and before his signature these words: "This Power of Attorney to remain in force one year from this date and to cover the State of Nevada only." The trial judge found that the power of attorney was given at the request of the plaintiff's associate, made attorney, "for the purpose of enabling him to make a settlement of all their interests in Nevada" and found that under the power of attorney the transfer in question was authorized. *Held*, that these findings of the judge not only were not plainly wrong but that they were supported fully by the evidence, and that the bill should be dismissed. Where on an appeal in a suit in equity it appeared that some of the evidence reported was incompetent, but that, if all the evidence to which objection was made should be excluded, the controlling facts would be in no way changed, it was *held* that no reversible error was shown. In the suit in equity above described there was no allegation of and no evidence of bad faith on the part of the associate of the plaintiff to whom the power of attorney was made, and there was nothing to indicate that anybody acting in behalf of the defendants had knowledge of any facts affecting them with notice of bad faith on the part of such attorney, and it was *said* that, even if the person to whom the power of attorney was given had been false to the plaintiff and had violated his duty toward him, that would not have affected the defendants if they had no knowledge of it and acted as reasonable men in good faith in relying upon the terms written in the power of attorney.

BILL IN EQUITY, filed in the Superior Court on April 26 and amended on October 20, 1916, seeking to have the defendant Brown, as the trustee under a pooling agreement, ordered to transfer to the plaintiff certain shares of the capital stock of the

Nixon-Nevada Mining Company, as more fully described in the opinion.

The case was heard by *Jenney, J.*, who made a finding of facts, including the facts that are stated in the opinion, the evidence being reported by a commissioner appointed to take the evidence under Equity Rule 35. The judge made an order that the bill be dismissed. Later by order of the judge a final decree was entered dismissing the bill with costs to the defendants. The plaintiff appealed.

*W. C. Cogswell*, (*J. H. Appleton* with him,) for the plaintiff.

*H. Williams, Jr.*, (*C. E. Fay* with him,) for the defendants.

RUGG, C. J. This is a suit in equity whereby the plaintiff seeks to have transferred to him certain shares of stock in the Nixon-Nevada Mining Company. The mining company was incorporated under the laws of Maine, had a place of business in Boston and was organized for the purchase of mines and interests therein in the State of Nevada and for the operation of such mines. The plaintiff and one Nelson entered into a contract in 1913 whereby they agreed to transfer to the company mining properties in the State of Nevada and the company agreed to pay to them specified shares of vendors' stock and upon named conditions further shares of treasury stock, all shares to be held by the defendant Brown as trustee under a pooling agreement for a term, which with its extensions had not expired when this suit was brought. This contract for purchase and payment was carried out on both sides.

It is contended that the plaintiff is precluded from maintaining this suit because all his interest in this stock has been transferred by Nelson by virtue of a power of attorney given him by the plaintiff. The transfer made by Nelson confessedly includes the plaintiff's interest in these shares, but it is urged that there was no authority conferred by the power of attorney to make such transfer. The crucial question to be decided is the true construction of this power of attorney.

It is permissible to examine all the circumstances under which a written instrument was executed, so far as actually or presumably present to the minds of the parties, for the purpose of enabling the court to understand their situation and to apply their words to the right subject matter in the light of all the attendant condi-



tions. Parol testimony is admissible in this connection, not to control the written words but to apply them to their proper objects. *Willett v. Smith*, 214 Mass. 494, 497.

The circumstances in the case at bar were that the plaintiff and Nelson were joint owners of mining rights in Nevada. After the transfer of several of these to the Nixon-Nevada Mining Company, Nelson was employed by the company to take charge of the mines thus transferred, and continued in this work until about March or April, 1915. Active operations at the mines were carried on until about January 1, 1915, when they were greatly reduced although not wholly suspended. The plaintiff left Nevada early in 1914, going to Calgary, Alberta, and later to the Hudson Bay region. There was some correspondence between him and Nelson referring to the mine operated by the Nixon-Nevada Mining Company and to controversies between Nelson and it, and to the possibility that the mine might revert to Nelson and the plaintiff.

The company was in financial difficulties. Nelson in his own name had commenced an action against it. The plaintiff knew of this fact. Nelson was in conference with the attorney of the company about the settlement of his claims and those of the plaintiff. It was under these circumstances that in May, 1915, at Calgary the plaintiff executed the power of attorney upon a printed blank, which he there procured and filled out. It was in broad terms. Without enumerating other subjects covered, so far as concerns stocks, the power of attorney authorized Nelson to demand and receive sums due the plaintiff "for or in respect of any shares, Stock or interest, which I may now or hereafter hold in any Joint Stock or incorporated Company," and "to sell and absolutely dispose of . . . such shares, stocks . . . and other securities for money as are hereinbefore mentioned, . . . and generally to act in relation to my estate and effects, real and personal, as fully and effectually, in all respects, as I could do if personally present." Then followed in the handwriting of the plaintiff these words: "This Power of Attorney to remain in force one year from this date and to cover the State of Nevada only."

It is plain that, if the concluding sentence were omitted, the power was comprehensive enough to authorize Nelson to transfer the interests of the plaintiff in the mining company. Even though

no shares of stock stood in his name, the plaintiff was the beneficial owner of stock standing in the name of the defendant Brown, to hold as trustee solely for the purpose of executing the pooling arrangement. This beneficial right of the plaintiff in the shares thus held was included within the descriptive words "interest . . . in any . . . incorporated Company" used in the power of attorney.

The circumstances under which this power of attorney was executed, and the relations of the parties to property in Nevada, negative the contention that it did not extend to the property in which Nelson and the plaintiff were jointly interested. Cases like *Attwood v. Munnings*, 7 B. & C. 278, have no pertinency to these facts. Plainly an agent may be empowered to sell property of his principal in connection with his own property. *Cutter v. Demmon*, 111 Mass. 474.

We are of opinion that the extensive authority of this power of attorney is not so cut down by the concluding phrase, "to cover the State of Nevada only," as to prevent Nelson from making a valid transfer of the plaintiff's interest in the stock. Manifestly these words of limitation refer to the subject matter respecting which and not to the place where the power of attorney is to be exercised. Read in the light of the relations of each of these parties to the other and to property rights centering in Nevada, the words "to cover the State of Nevada only" mean that the power of attorney is to be exercised as to property either physically located within that State or deriving its value from ownership of property physically located within that State. Of course in most aspects the property of stockholders in corporations in their respective shares of stock is separate and distinct from the property of the corporation. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 57-59. Commonly also the *situs* of shares of stock is at the residence of the owner or at the domicile of the corporation. *Kennedy v. Hodges*, 215 Mass. 112. *Baker v. Baker, Eccles & Co.* 242 U. S. 394, 401. Yet in a remote sense a certificate of stock is "an interest in the property of the corporation which might be in other States than either the corporation or the certificate of stock." *Hatch v. Reardon*, 204 U. S. 152, 161.

The words of limitation in the power of attorney at bar were used by mining operators, who had been engaged as joint owners

of a mine and mining claims. They had ceased to be conjointly active in this enterprise and one had gone to a foreign country. He was familiar through letters from his associate with the conduct and standing of the corporation which was working the mine. He was giving to his co-adventurer a power of attorney, which, although comprising in terms a wide grant of authority, for all practical purposes was confined to matters connected with their common rights in mining interests. It does not appear that there was any other subject matter upon which it could operate.

There was no property of the plaintiff in Nevada except that connected with the mining venture in which he and Nelson were interested. When under these circumstances the broad power, including stocks as well as other real and personal property, is "to cover the State of Nevada only," a fair interpretation of its terms is that it is to be effective respecting all properties which derive their value from real or personal estate located within the State of Nevada, whether the title be in immediate proprietorship or in the indirect medium of ownership of stock in a corporation which holds the title, or as the beneficiary of such stocks held in trust for business reasons and purposes.

A careful examination of the entire record and all the evidence discloses no reason for reversing the findings of facts made by the judge. So far as material, they not only are not plainly wrong but appear to be fully supported by the evidence. They stand as true. *Lindsey v. Bird*, 193 Mass. 200. There is nothing in the finding which amounts to a variation by parol of the written power of attorney.

The finding, that the power of attorney "was given at the request of Nelson, and for the purpose of enabling him to make a settlement of all their interests in Nevada," was not contrary to the terms of the power of attorney. In part, at least, it relates to the circumstances attending its execution. Moreover, some of the defendants, not being parties to that instrument or the privies of the parties, would not be bound by its terms. See, in this connection, *Wilson v. Mulloney*, 185 Mass. 430, *Harves v. Weeden*, 180 Mass. 106, and *Johnson v. Von Scholley*, 218 Mass. 454. Even if this finding of fact be disregarded either as irrelevant or not supported by competent evidence, the result is not affected. Doubtless some of the testimony of Springmeyer was incompetent.

But no reversible error is shown for the reason that, if the portions to which objection was made should be excluded, the controlling facts would be in no wise changed. Treating all such testimony as out of the case, we perceive no ground for modifying the decision.

The plaintiff's case does not proceed on the footing of fraud on the part of the defendants. There is no such allegation in the bill. Moreover, there is nothing in the evidence which requires or warrants a finding that Nelson was false to the interests of the plaintiff to the knowledge of the defendants. There is an express finding that Springmeyer, who made the adjustment in behalf of the mining company and of Jefferson, "acted in good faith." This finding is supported by evidence and there appears to be no ground for reversing it. There is nothing to indicate that either he or any of the defendants had knowledge of facts which affect them with notice of any bad faith on the part of Nelson. If Nelson was false to the plaintiff and did not as between the two proceed in accordance with his duty, that is nothing for which the defendants are responsible provided they acted as reasonable men in good faith in reliance upon the terms written in the power of attorney.

*Decree affirmed with costs.*

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ANNIE SEABUT vs. WARD BAKING COMPANY.

Suffolk. October 14, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, In use of highway.*

If a woman, starting to cross a city street on her way to church, steps from the sidewalk, then stops and looks to her right and left and, finding no vehicle in sight, proceeds to cross the street slowly in a slightly diagonal course for a distance of about fifteen feet, and if a delivery wagon that has turned into the street from a cross street less than two hundred feet distant is being driven very fast and the driver, although he sees the woman with her back partly toward him, makes no effort to check the speed of the horse or to warn the woman of his approach and she is struck by the horse and run over, in an action against the owner of the horse and wagon, who was the employer of the driver, for her injuries thus caused, the plaintiff is entitled to go to the jury on the issues of the negligence of the defendant's servant and of her own negligence.

In the case above described it was *said* that, even if the accident had happened

before the enactment of St. 1914, c. 553, there would have been evidence for the jury of the plaintiff's due care.

It is not negligent as matter of law for a person on foot to cross a city street between cross walks taking a slightly diagonal course.

TORT for personal injuries sustained on April 5, 1916, when the plaintiff was crossing on foot Fifth Street in the part of Boston called South Boston, by being run into by a horse and delivery wagon negligently driven by a servant of the defendant. Writ dated April 25, 1916.

The defendant's answer contained an allegation that the plaintiff's negligence contributed to her injury.

In the Superior Court the case was tried before *Sanderson, J.* The facts in favor of the plaintiff which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant made a motion asking the judge to order a verdict for it. The judge denied the motion. The defendant then asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff cannot recover in this action.

"2. Upon all the evidence the plaintiff was not in the exercise of due care.

"3. Upon all the evidence the driver of, the team was not negligent.

"4. If the jury find that the plaintiff crossed the street in a diagonal direction, with her back partly toward the approaching team, not at a cross walk, and, after leaving the curbstone at a place not a cross walk, did not look or listen for an approaching team, and the accident occurred when she was half way across the street, the plaintiff was not in the exercise of due care.

"5. If the jury find that the plaintiff looked in the direction of B Street while on the sidewalk, in front of her house, and while walking on the sidewalk approximately half way toward the Polish Church, and then left the sidewalk without looking again and walked half way across the street paying no attention to a team that might be coming toward her and was struck by the team when she was in the middle of the road, they cannot find that she was in the exercise of due care."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$960. The defendant alleged exceptions.

*J. T. Connolly*, for the defendant, submitted a brief.

*R. T. Healey*, for the plaintiff.

DE COURCY, J. After a verdict for the plaintiff, we must assume that the jury believed the testimony most favorable to her contentions. They were warranted in finding that at about half past six o'clock in the morning she started to cross Fifth Street in South Boston, from her home to the church; that after stepping from the northerly sidewalk she stopped, looked to her right and left, and no vehicle was in sight; that she proceeded slowly across the street, in a slightly diagonal course, for a distance of fifteen feet or less; that meanwhile the defendant's delivery wagon, going very fast, turned into Fifth Street from B Street (which was less than two hundred feet distant); and although the driver saw the plaintiff with her back partly toward him, he made no effort to check the speed of the horse or to warn the plaintiff of his approach, — and she was struck by the horse and run over. Plainly she was entitled to go to the jury on the issues of the defendant's negligence and her own due care, even regardless of St. 1914, c. 553. *Hennessey v. Taylor*, 189 Mass. 583. *Crimmins v. Armstrong Transfer Express Co.* 217 Mass. 155. *Walker v. Gage*, 223 Mass. 179. She had a right to cross the street between cross walks, using due care. *Slee v. Lawrence*, 162 Mass. 405. The fourth request was rightly refused; and the subject matter of the fifth was covered fully and fairly in the charge. *Altavilla v. Old Colony Street Railway*, 222 Mass. 322.

*Exceptions overruled.*

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JENNIE M. NAYLOR vs. ADDIE M. NOURSE.

Essex. October 15, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Practice, Civil*, Appeal, Memorandum of judge. *Joint Tenants and Tenants in Common. Husband and Wife. Widow.*

On an appeal from a decree made by a judge of the Superior Court establishing a lien under St. 1909, c. 490, Part II, §§ 74, 75, for the amount of the respondent's proportion of taxes on certain real estate which had been paid by the petitioner as cotenant and ordering a sale of the respondent's interest in the

real estate, a memorandum of decision made by the judge is not a part of the record, and, if printed with the record of the appeal, it must be disregarded by this court.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, a widow, whose husband died intestate without issue leaving an estate worth less than \$5,000, takes upon his death a vested right in his real estate as his statutory heir.

The provisions contained in St. 1905, c. 256, in regard to setting out the real estate to the widow in such a case, do not abridge nor qualify the nature of her interest.

PETITION, filed in the Superior Court on July 31, 1917, under St. 1909, c. 490, Part II, §§ 74, 75, by a tenant in common of four parcels of real estate in Lynn to establish and enforce a lien on the respondent's interest as alleged cotenant in such real estate to secure the payment to the petitioner of the respondent's proportion of the taxes on such real estate for the year 1916, the whole of which were paid by the petitioner.

In the Superior Court the case was heard by *Dubruque, J.* The judge filed a "Memorandum" stating his findings and an order for a decree, and later filed an "Amended memorandum." Both of these were printed with the record of the appeal, but, as stated in the opinion, were disregarded by this court. The facts that appeared by the record itself are stated in the opinion. The judge made a decree establishing the petitioner's lien as prayed for and ordering a sale of the respondent's interest in the real estate to satisfy the petitioner's lawful claim. The respondent appealed.

*W. E. Sisk, R. L. Sisk & W. O'Shea*, for the respondent, submitted a brief.

*G. H. McDermott, (J. M. Fowler with him,)* for the petitioner. Lieutenant Colonel *F. G. Bauer*, who originally had charge of the case for the petitioner, was absent on military service in France.

DE COURCY, J. The petitioner owns an undivided half interest in four parcels of real estate in the city of Lynn. The other undivided half interest was owned by her brother James G. Nourse, who died April 15, 1915, intestate, leaving a widow, who is the respondent, Addie M. Nourse, and no issue. No administration has yet been granted on his estate. In June, 1917, the petitioner paid the entire tax assessed by the city on said real estate for the year 1916. She then brought this petition, under St. 1909, c. 490, Part II, §§ 74, 75, to enforce a lien upon the interest of the respondent as cotenant of said real estate, for the proportion of such tax payable by said Addie M. Nourse. The case is before

us on the respondent's appeal from the decree of the Superior Court, establishing the lien and ordering a sale of the respondent's undivided interest to satisfy the petitioner's lawful charges and expenses.

The only objection to the decree relied on by the respondent is the contention that she has no title in said real estate, and therefore cannot be a tenant in common with the petitioner. Although we must disregard the memorandum of the trial judge, as it is no part of the record (*Cressey v. Cressey*, 213 Mass. 191) the facts are not in dispute. So far as the record discloses there were no unpaid debts of the deceased James G. Nourse, no charges against his estate, and no personal property left by him. In any event it is admitted that the whole amount of the estate left by him was less than \$5,000 in value. See St. 1905, c. 256. The statute which determines the rights of his surviving spouse, the respondent, is R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256. The portion here material reads as follows: "If the deceased leaves no issue, the surviving husband or widow shall take five thousand dollars and one half of the remaining personal property and one half of the remaining real property." The contention of the respondent, that under this statute she would acquire no interest in the real estate unless and until it should be set off to her, is disposed of by the recent cases *Nesbit v. Cande*, 206 Mass. 437, and *Walden v. Walden*, 213 Mass. 418. Upon the death of her husband without issue, and leaving an estate amounting to less than \$5,000, she took a vested right in his real estate as statutory heir. The provisions of the statute for the sale or the setting out to her of the real estate, do not abridge nor qualify the nature of her interest, but merely afford means of determining the existence and extent of her right, and an additional form of remedy to assert her title. *Nesbit v. Cande*, *supra*. *Sears v. Sears*, 121 Mass. 267, 269. *Eastham v. Barrett*, 152 Mass. 56. See *Bury v. Sullivan*, 201 Mass. 327.

*Decree affirmed with costs.*



EDMUND D. CODMAN vs. LORIN F. DELAND & others, trustees,  
(afterwards by amendment JOHN L. NEWELL & others, trustees).

Suffolk. October 15, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Contract*, What constitutes. *Deed*, Assumption of mortgage. *Mortgage*, Of real estate: assumption of mortgage debt by grantee. *Surety*, Discharge by extension without notice.

An agreement in writing under seal between a mortgagee of real estate and a grantee of the mortgagor, who by the terms of his deed agreed to assume and pay the mortgage, providing for an extension of the mortgage debt, if signed by both in duplicate, and acknowledged by the mortgagee on the duplicate original intended for the grantee, but not acknowledged by the grantee on the duplicate original intended for the mortgagee, where there was no condition that the instrument should take effect only on acknowledgment by the grantee, can be found to have been executed by both parties and to have gone into effect upon its execution.

In this Commonwealth where the grantee in a deed assumes and agrees to pay a mortgage on the property conveyed he becomes as between himself and his grantor the principal debtor for the payment of the mortgage debt assumed by him, and the mortgagor as to the grantee becomes a surety, although this does not bind the mortgagee unless he assents to it, but, if thereafter the mortgagee, without the assent or knowledge of the mortgagor, makes an agreement in writing under seal with the grantee extending the time of payment of the mortgage note at an increased rate of interest, the mortgagee by such agreement accepts the grantee as the principal debtor and the mortgagor as a surety and, by the agreement to extend the time of payment contained in the same instrument, made without the knowledge of the mortgagor, discharges the mortgagor from his liability as surety.

BILL IN EQUITY, filed in the Superior Court on December 2, 1915, and amended on March 11, 1918, by the mortgagee of certain real estate on the Bay State Road in Boston, against the defendants, who as trustees were the successors of the mortgagor, to collect a balance of the mortgage debt remaining due after a foreclosure sale.

The case was heard by Fox, J., who found the facts that are stated in the opinion. Upon these facts and the evidence before him he "found that the agreement for extension was executed by both parties and went into effect upon its execution, and ruled

that the effect of such extension was to bar the plaintiff's right of recovery in the present case; and, without considering the other defences relied on by the defendants," ordered that the bill be dismissed with costs and, at the request of the plaintiff, reported the case for determination by this court, such decree to be entered as justice and equity might require.

*W. P. Everts*, for the plaintiff.

*H. M. Davis*, for the defendants.

RUGG, C. J. The defendant Deland, in his capacity as trustee, in 1905 executed a note for \$17,000, payable in three years to the plaintiff, which was secured by a mortgage upon real estate in Boston. Before the maturity of the note the mortgagor conveyed the real estate to Nellie H. Miller by a deed referring to the mortgage, which the grantee therein agreed to assume and pay. The defendant as mortgagor straightway thereafter notified the plaintiff as mortgagee by letter of the sale and of the assumption of the mortgage by the grantee. When the note matured, the mortgagee advised the grantee that, if she desired an extension, \$2,000 must be paid on the principal and the rate of interest would be increased. A formal extension agreement under seal was signed by both parties, wherein the mortgagee agreed to extend the time for the payment of the principal for three years until 1911, and the grantee agreed to pay the principal at that time and to pay the increased rate of interest. The grantee did not pay the principal, nor the interest, nor the taxes after 1914. In 1916 the mortgagee foreclosed the mortgage and received for the sale of the real estate \$11,000. This was its fair market value, it having depreciated markedly since 1908. This suit is brought to recover from the mortgagor the balance due upon the note.

The judge has found that the agreement for extension was executed by both the mortgagee and the grantee and went into effect on its execution. This finding cannot be reversed and must stand. It appears that the agreement for extension was drafted in duplicate, each copy identical with the other except that the acknowledgment clause upon one was in form for the grantee and upon the other for the mortgagee. They were drafted by the attorney for the grantee and submitted to the mortgagee, who approved their form. Both then were signed by the grantee, but neither was acknowledged by her because of illness. Both then

were signed by the mortgagee, whose acknowledgment was taken and certified upon the one designed for that purpose, and he then returned both copies to the attorney for the grantee. That attorney tried to get her acknowledgment and wrote her several times to come to his office for that purpose. She never came, afterwards left Boston and is reported to be in Austria. The clerk of the mortgagee endeavored repeatedly to get one copy of the agreement with the acknowledgment of the grantee, and was informed that the papers were mislaid or lost. Both copies remained in the possession of the attorney of the grantee.

These facts and the inferences which reasonably may be drawn therefrom warrant the conclusion that the agreement for extension was executed by both parties thereto without condition and was delivered. The circumstance that the copy of the agreement intended to be kept by the mortgagee was not acknowledged by the grantee is not decisive. Acknowledgment was not necessary to its validity. Both copies were signed by each party. Apparently the delivery was absolute. There is nothing in the record which required a finding or ruling that they were intended to take effect only upon acknowledgment by the grantee of the copy arranged for that purpose or upon any other condition. The case of *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342, relied on by the mortgagee, is plainly distinguishable in this particular.

The extension agreement between the grantee and the mortgagee, without the knowledge and assent of the mortgagor, bars the present suit against the latter. It was held in *Rice v. Sanders*, 152 Mass. 108 that, when a grantee in a deed assumes and agrees to pay a mortgage on the property conveyed, he takes upon himself the burden of the debt or claim secured by the mortgage and as between himself and his grantor he becomes the principal and the latter merely a surety for the payment of the debt. The mortgagee is not bound by such an agreement unless he assents to it. But when, with knowledge of such an agreement, he enters into an independent stipulation on his own account with the grantee, whereby he obtains a new obligation running directly to himself on the footing that the grantee becomes principal, then in the absence of special conditions he is held to have recognized and become bound by the relation of principal and surety existing between the mortgagor and the grantee. By the agreement with

the mortgagee in the case at bar the grantee agreed to pay the debt and she became the principal debtor. It follows that the agreement for extension of time of payment given to the grantee operated to discharge the mortgagor as original debtor, now become surety. The fact that the agreement to pay the debt and to grant extension of time for payment were embodied in the same instrument is immaterial in this connection. The case is governed by *Franklin Savings Bank v. Cochrane*, 182 Mass. 586, *North End Savings Bank v. Snow*, 197 Mass. 339.

*Shepard v. May*, 115 U. S. 505, is distinguishable because in that case there was no immediate agreement (as there is in the case at bar) between the mortgagor and his grantee that the latter would assume and pay the debt to the mortgagee. The point adjudged in *Keller v. Ashford*, 133 U. S. 610, while not the same here presented, is not at all at variance with our conclusion. As is pointed out in *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, that decision rests upon the local law of the State of Illinois, which differs from that of this Commonwealth and of the United States courts upon the vital point whether the mortgagee may sue at law a grantee who by the conveyance to him has assumed the payment of the mortgage debt. Such direct action is not allowed under our decisions. *Mellen v. Whipple*, 1 Gray, 317. *Coffin v. Adams*, 131 Mass. 133. *Creesy v. Willis*, 159 Mass. 249. That principle marks an important distinction in the application of the relation of principal and surety to a mortgagor and his grantee with reference to the mortgagee; but it has no pertinency to the facts here disclosed.

It follows that the order dismissing the bill with costs was right.

*Decree accordingly.*

## JONATHAN DOW'S (dependent's) CASE.

Suffolk. October 15, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Workmen's Compensation Act. Proximate Cause.*

In a claim under the workmen's compensation act by the dependent of an employee, who was found dead with his throat cut by a dangerous machine on which he worked and into which he had fallen, the burden of proof is upon the dependent to show that the employee was alive when he fell into the machine.

A boy of nineteen was employed as the tender of a beaming machine, which wound yarn on a revolving beam. He had one very badly diseased lung and the valves of his heart were shrunk. Nobody saw him fall into the machine, but his body was found lying on the machine with his throat cut by it. There was blood two or three feet away from the machine "as if it was all one spurt" and there was a little blood on the machine. A few moments before the accident he had talked with his foreman in front of his machine and was apparently all right. These facts were shown in a claim made by his dependent under the workmen's compensation act. The uncontradicted testimony of the only expert witnesses was to the effect that, as to whether the boy was dead when he struck the machine or whether he was living and the machine caused his death, it was as reasonable to say one thing as another, and that it would be absolutely impossible for any doctor to say definitely whether or not he was dead when he struck the machine. The Industrial Accident Board found that the "evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time," and awarded compensation to the dependent. On an appeal from a decree of the Superior Court in accordance with this decision, it was *held* that this court could not say as matter of law that the conclusion of the board was unsupported by the evidence.

In the same case it was contended by the insurer that, assuming that the employee was alive when he struck the machine, the cause of his fall was the proximate cause of his death and that the cause of his fall was unknown or conjectural, but it was *held* that the cause of his fall was the remote cause and that the fall itself was the dominant and proximate cause of the injury that resulted in death.

It also was *held* that the fall into the machine from the place in front of it where the employee was standing in the active performance of his duty arose out of and in the course of his employment.

In the same case it was *said* that the test in such a case is to consider, whether the danger of injury from a fall into or upon the machinery then being used by an employee is an incident of his employment and one to which he would not have been exposed apart from that employment.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the

Industrial Accident Board, affirming the findings and decision of a single member of that board, awarding compensation to Lillian M. Dow, the partially dependent mother of Jonathan Dow, an employee of the American Tire Fabric Company nineteen years of age, who was the tender of a beaming machine or beamer and died on June 20, 1917, after, as alleged, sustaining the injury described in the opinion.

The decision of the Industrial Accident Board from which the appeal was taken was as follows: "The Industrial Accident Board affirm and adopt the findings and decision of the board member; and find that the death of the employee was due to a personal injury which arose out of and in the course of his employment as a beamer tender for the subscribers on June 20, 1917; that from some unknown cause, but in all probability in view of the physical conditions disclosed by the autopsy, from 'collapse as a result of his condition,' he fell over into such a position on his machine that his hand and arm were drawn into the machine and his body pulled down so that his neck came across a revolving beam, causing the severing of all the arteries and resulting in the employee's death; that the employee was not dead when he fell upon the machine; that the average weekly wages of the employee were \$13; that he contributed the sum of \$8 a week to the support of the claimant, Lillian M. Dow, his mother, during the twelve months next preceding the date of his injury and death; that she was in fact partially dependent upon him for support and entitled to a weekly compensation of \$5.34 from the insurer for a period of five hundred weeks from June 20, 1917."

The case was heard by *Wait, J.* The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

*G. Gleason & E. C. Stone*, for the insurer, submitted a brief.

*H. I. Bartlett*, (*O. H. Nelson* with him,) for the dependent.

*PIERCE, J.* The deceased employee was a beamer tender in the employ of the American Tire Fabric Company. As such, it was his business to see that yarn was wound round a revolving beam, or cylinder, which had a beam head with a flat surface and an edge about five eighths of an inch wide. Back of the beam upon which the yarn is wound is a roll four or five inches in diameter,

which presses against the beam; and there is a long leverage which goes to the ceiling and there gives compressed leverage. Because of the pressure roll the beamer tender is never supposed to pass his hand across the yarn to see whether it is running smoothly. If anything was wrong with the machine it was the duty of the employee "to put his foot on the treadle and stop the machine."

A few minutes before the accident the deceased, apparently all right, talked to his foreman in front of his machine. No one saw the accident. The machine was stopped almost immediately after the accident. The deceased was found with his left arm in the machine and his right arm outside the beam. "His left hand and arm were caught in and his right arm was lying outside 'toward the large cam the other side of the cogwheel.' . . . The carotids and jugular vein were severed. . . . The windpipe was severed and all the muscles were 'pretty well torn.'" When the machine was reversed and the body removed, life was extinct. There was blood two or three feet away from the beamer "as if it was all one spurt," and a little blood on the machine. The body was embalmed, not by the usual process, but the fluid was put into the abdominal cavity which fluid more than offset the weight of blood lost. Two weeks after the death of the employee an autopsy was made. The physician who performed the autopsy testified: "that the right lung was practically atrophied but there was function. The left lung was nearly normal. The valves of the heart were shrunken. There was evidence of vegetations of the mitral valve. He did not make a microscopic examination of the lungs. He further testified that the diseased lung was one of the worst lungs he had ever seen. The left lung was the one that performed the function of the lungs and from his examination he would have looked for endocarditis or myocarditis or possibly both. There was and had been endocarditis and that would involve the valves of the heart. Endocarditis would be an affliction of tuberculosis of the lungs, particularly in its late stage. The vegetations found might cause aortic regurgitation. He further testified that a subject such as this, in the last stages of tuberculosis would be toxic and stated that there would not be sufficient aspects in the lungs to give him the necessary oxygens to keep up an illuminative process. Dow, in his opinion, was dying on his feet and he did not and could not reason out how he could hold

down a working position. It was his opinion that Dow's heart was weak and that further he was poorly nourished. In answer to the question 'whether from his autopsy he could say Dow was dead by the time he struck the machine,' the doctor testified that if there had been no injury as a result of the fall on the machine and Dow had been attacked, he would have expected at the time he performed the autopsy that the man was in the last stages of tuberculosis with a consequent affection of the heart and that he dropped dead, but having his throat cut there was a chance that he had a collapse as a result of his condition and fell and got his neck cut."

Manifestly the burden of proof was upon the dependent to prove that the alleged injury to and death of the employee were sustained and resulted while the employee was alive, and that it arose out of and in the course of his employment. Upon the uncontradicted testimony of the two and only expert witnesses (if believed) to the effect that, whether the boy was dead when he struck the machine or whether he was living and the machine caused his death, it is as reasonable to say one thing as another; and that whether or not he was dead at the time he struck the machine would be absolutely impossible for any doctor to say definitely, the member and the Industrial Accident Board warrantably could have found that the solution of the question remained one of pure conjecture. But the member and the board were not bound to believe or to accept the conclusions of these witnesses; and they had the right, based upon reasonable inferences drawn from the facts established by the evidence before them, to find, as they did, that the employee was not dead when he fell upon the machine, but was living and the machine caused his death. The member and the board based that finding principally upon the fact that the "evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time." *Von Ette's Case*, 223 Mass. 56. See *Sanderson's Case*, 224 Mass. 558. We cannot say as matter of law that the conclusion of the member and board was unsupported by the evidence.

The insurer next contends that "if the employee was alive when he struck the machine, the cause of his fall was the proximate cause of his death, and that cause is unknown or conjectural." It



is quite plain the cause of the fall was the remote cause, and that the fall itself was the dominant and proximate cause which placed the body of the employee in such relation to revolving parts of the machine that the edge of the beam head pressed against the neck of that person in such manner as to sever the carotids, tear out the neck and cause death. *Bohaker v. Travelers Ins. Co.* 215 Mass. 32, 35, and cases cited.

The insurer finally contends that the fall did not arise out of the employment. Indisputably the injury occurred during the course of the employment, and the fall into the machine was from the place in front of the machine where the employee was standing in the active performance of his duty.

The real question is not so much the cause of the fall or whether the fall as such arose out of the employment, but whether the risk and harm of a fall into or upon machinery then in use by an employee are incidents of that business and hazards to which the workman would not have been exposed apart from that business. *McNicol's Case*, 215 Mass. 497, 499. *Wicks v. Dowell*, [1905] 2 K. B. 225. We think the injury arose out of and in the course of the employment. *Brightman's Case*, 220 Mass. 17. *Mooradian's Case*, 229 Mass. 521. *Hallett's Case*, 230 Mass. 326, 328.

*Decree affirmed.*

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SUSAN H. SCHNEIDER vs. CLARA M. HAYWARD & another,  
trustees.

Suffolk. October 15, 16, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Equity Pleading and Practice*, Master's report, Appeal, Decree, Parties. *Equity Jurisdiction*, For an accounting. *Trust*, Duties of trustee. *Estoppel*. *Witness*, Cross-examination. *Evidence*, Of value.

Where a suit in equity for an accounting was referred to a master, to find and report the facts, and he filed a report, reporting no evidence, and the exceptions filed to this report were overruled by an interlocutory decree from which no appeal was taken, and where the case then was referred to a second master to state the final account, and this master filed a report, stating the account, without reporting any evidence, and one of the parties filed exceptions to his report,

which were overruled by an interlocutory decree, followed by a final decree, from both of which the same party appealed, it was *held* that the findings of fact stated in the first master's report must stand except so far as modified by subsequent and additional facts stated in the second master's report, and that, as no evidence was reported, no finding of fact in either report was open to revision and the only questions open were those raised by the exceptions to the second master's report and those arising on appeal from the final decree, namely, whether the decree was within the scope of the bill and was warranted by the facts found by the two masters.

Where in a suit in equity against trustees holding property for the benefit of three beneficiaries, one of whom was one of the trustees, for an accounting, it appeared that the defendant who was both a trustee and a beneficiary misappropriated certain articles of personal property belonging to the trust, but afterwards delivered some of these articles to the other two beneficiaries, it was *held* that the acceptance by the other two beneficiaries of the articles delivered to them was simply the receipt by them of partial distributions on account from the delinquent trustee, who happened also to be their co-beneficiary, and did not estop the two beneficiaries who had received these articles from requiring that defendant to account for a further large amount of like property misappropriated by her.

In the case above described it was *held* that it was within the discretionary power of the trial judge, upon the cross-examination of one of the three beneficiaries by the misappropriating defendant, to refuse to permit the witness to be asked how the articles set off to her and to the plaintiff compared in value with those received by the defendant, this being a collateral matter.

The cost of a chattel often is competent evidence of its value, where there is nothing to indicate that the time of purchase was too remote for the evidence to be of assistance in determining the value.

In a suit in equity against trustees for an accounting, where it has been shown that one of the defendants, who also was a beneficiary, without justification removed to another State certain articles of personal property belonging to the trust and thus practically deprived the other beneficiaries of the opportunity of having the articles examined and appraised by experts, such defendant cannot complain rightly of the evidence of the value of the misappropriated articles to which the parties interested have been compelled to resort by the obstacles to a proper valuation of the articles voluntarily created by that defendant.

In the suit above described, where only one of the defendant trustees had appealed from the final decree, the court declined to grant a request made at the argument before this court by the counsel for the other trustees, that the decree be modified in their favor, they not being parties to the proceeding in this court and the aspect of the case affecting them not having been presented.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 18, 1914, and a supplemental bill filed in the same court on December 10, 1915, by one of the beneficiaries of a trust created by a deed dated December 28, 1911, executed by the plaintiff's father, William E. Hayward, late of Brookline, who died on August 5, 1914, and further defined by an agreement of trust dated December 12, 1912, against the trustees under the

deed, one of whom was Clara M. Hayward, the widow of the settlor, for an accounting.

The proceedings in the case, including the reports of two masters, are described in the opinion. The exceptions to the report of the second master were argued before *Carroll*, J., who made an interlocutory decree overruling all the exceptions and ordering that the report be confirmed. The defendant Clara M. Hayward appealed.

Later by order of the same single justice a final decree was entered, which contained the following orders:

"1. That the final account of the defendants Clara M. Hayward and Charles E. Myers as trustees under the deed of trust referred to in the bill of complaint be established. . . .

"2. That said Clara M. Hayward and Charles E. Myers convey by good and sufficient deeds to the plaintiff Susan H. Schneider, to the defendant Evadne H. Hibben and to said Clara M. Hayward, each, one undivided third interest in the Wisconsin mineral rights referred to in the respective masters' reports herein.

"3. That said Clara M. Hayward and Charles E. Myers convey by a good and sufficient deed to said Evadne H. Hibben the tract of land in Oklahoma referred to in said masters' reports.

"4. That said Clara M. Hayward pay to said Susan H. Schneider the sum of \$10,409.86 (being the sum of \$9,706.18 with interest thereon from February 17, 1917, and, together with the undivided third of the Wisconsin mineral rights above mentioned, constituting the distributive share of said Susan H. Schneider in the trust estate not yet distributed), and that execution issue for said sum.

"5. That said Clara M. Hayward pay to said Evadne H. Hibben the sum of \$8,722.12 (being the sum of \$8,044.61 with interest thereon and on the further sum of \$1,300 from February 17, 1917, and, together with the undivided third of the Wisconsin mineral rights and the Oklahoma land above mentioned, constituting the distributive share of said Evadne H. Hibben in the trust estate not yet distributed), and that execution issue for said sum."

The defendant Clara M. Hayward appealed. The points raised by her exceptions to the second master's report are stated in the opinion.

*C. E. Springstun* (of Illinois), for the defendant Hayward, submitted a brief.

*W. H. Irish*, for the defendant Myers, did not submit a separate brief.

*F. N. Nay*, for the plaintiff.

*H. S. Davis*, for the defendant Hibben, of like interest with the plaintiff.

RUGG, C. J. This suit in equity is brought by one of three beneficiaries under a deed of trust executed by William E. Hayward, against the trustees, to compel an accounting and a settlement of the trust. It was referred to a master on the original and supplementary bills and answers under a rule which required him to find and report the facts. No evidence was reported. Although exceptions were taken, these were overruled by an interlocutory decree from which no appeal was taken. The case was sent to another master "to state the final account" of the trustees and "to find and report all sums with which" the trustees "are jointly and severally chargeable agreeably to the report" of the former master. The report under this rule stated the account and several exceptions taken by the appealing trustee, but the evidence was not reported. An interlocutory decree was entered overruling these exceptions and confirming the report. From this and from the final decree Clara M. Hayward, the widow of the settlor, who is also one of the three beneficiaries under the deed and one of the trustees, alone appealed.

The findings of fact as stated in the first master's report must stand except and in so far as modified by subsequent and additional facts found in the second master's report. No finding of fact in either report is open to revision since no evidence is reported. The only questions open are those raised by exceptions to the second master's report and those arising on appeal from the final decree. But these latter are confined to the points whether the decree is within the scope of the bill and warranted by the facts found in the two reports. *Eddy v. Fogg*, 192 Mass. 543. *Lyons v. Elston*, 211 Mass. 478, 482.

One of the controversies between the parties related to valuable furniture, rugs, draperies, books, works of art and similar articles, which formed a part of the trust. The first master's report established without qualification that Clara M. Hayward, the

appealing trustee, hereafter called the defendant, had misappropriated and taken out of the Commonwealth at some time between the spring of 1914 and February, 1916, considerable amounts of this property. Comparatively small portions of it remained in a storage warehouse in or near Boston. The second master's report states that on February 18, 1916, after the hearings before the first master, certain of these remaining goods were set off to the other two beneficiaries at stated valuations agreed to by all parties. The first master's report was filed in June following. There is nothing in the contention that this partial distribution by the defendant to two of the beneficiaries abrogates the findings of fact in the first report or renders it a nullity. This particular matter was simply a taking by two of the beneficiaries of partial payments on account from a delinquent trustee who happened also to be a co-beneficiary under the trust. It has not the slightest effect upon the other findings in that report. They justly form in part the basis for the final decree. The first master's report did not undertake to state the account of the trustees. That is wholly covered by the second report, where these two items of partial distribution are properly credited and charged. The contention that the acceptance of this partial distribution of furniture and similar property by the other two beneficiaries estops them from requiring the defendant as trustee to account for the large amount of like property misappropriated by her, is without foundation. It is too plain for discussion that a trustee in default must account for the trust estate.

There is no ground whatever for the suggestion that the second master used a different standard, in ascertaining the value of the goods wrongfully taken from the trust by the defendant, from that used in fixing the value of the furniture and like property distributed to the other two beneficiaries. The master had nothing to do with fixing that value, because it was agreed to by all parties in interest. He merely accepted that agreement as he found it. He performed his duty of ascertaining the value of that for which the defendant was accountable.

The master rightly refused in his discretion to permit one of the beneficiaries to be asked on cross-examination how the goods set off to her and the plaintiff compared in value with those received by the defendant. *Lawton v. Chase*, 108 Mass. 238. This was a collateral matter.

No error is shown in the admission of evidence as to the cost of the goods for which the defendant must account. Cost is often pertinent in ascertaining present value. *Wall v. Platt*, 169 Mass. 398, 407. There is nothing to indicate that it was too remote in time to be of assistance. Moreover, the defendant had removed the goods from the Commonwealth without justification and thus practically deprived the parties of having them examined by experts or by the master. Obstacles voluntarily created by the defendant greatly complicated the determination of their value. She cannot rightly complain of any evidence disclosed on this record. All the questions argued by the defendant have been considered. Other exceptions require no discussion. There is no error.

Counsel for the other trustee at the argument before this court asked that the decree be modified to the extent of issuing execution in his or their favor for the payment of the amount found due in the master's report either against the trustees or against a deposit in a trust company. That ought not to be done at this stage against the objection of the beneficiaries. Without enumerating other reasons, it is enough to say that such counsel are not parties to this proceeding and the case upon this aspect has not been tried.

*Decree affirmed, with costs of this appeal to be taxed against Clara M. Hayward personally.*

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RUTH A. FREED vs. LOUIS ROSENTHAL.

Suffolk. October 16, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Municipal Court of the City of Boston*, Findings of judge. *Mortgage*, Of personal property: foreclosure under power of sale. *Conversion*. *Auctioneer*.

Where in a report made by a judge of the Municipal Court of the City of Boston to the Appellate Division of that court certain findings of fact are stated but all the evidence is not reported, the findings of the judge must be accepted; and this is true of his findings which, although not stated expressly, are necessarily involved in the rulings and findings made by him.

A mortgage of chattels gave to the mortgagee upon breach of a condition of the mortgage a power of sale, which provided that the mortgagor should be notified

in the manner provided by R. L. c. 198, § 5, "of the time and place of any such sale to be made in foreclosure proceedings, at least seven days before such sale." The section of the statute referred to requires notice in writing, "which shall be served by leaving a copy with the mortgagor or person in possession of the property claiming the same or by publishing it at least once in each of three successive weeks" in such a newspaper as is described. There having been a breach of the conditions of the mortgage, the holder of it employed an auctioneer, who gave notice of a sale to be made under the power above described by publication in a suitable newspaper in a form to which no objection was made. The notice was of a sale to take place on July 10. The notice was published on June 30, July 2 and July 9. On July 10 the sale was continued to July 13 and then was made. The mortgagor, in an action against the auctioneer for an alleged conversion of the mortgaged chattels sold by the defendant at public auction, contended that the sale was invalid because the last publication of the notice of the sale did not precede the date of sale by seven days. *Held*, that by the terms of the power only seven days' notice of the sale was required and that the first publication, which was ten days before the date named for the sale, gave such notice.

In the case above described it also was *held* that the defendant auctioneer had a right in the exercise of a sound discretion to adjourn the sale and that the adjourned sale when made was in effect the sale of which previous notice had been given.

In the same case it was *said* that, although the auctioneer published a notice of the adjourned sale, he was under no legal obligation to do so, provided he acted reasonably and in good faith.

In the case above described it also was *said* that, so far as the parties to the mortgage, in fixing the kind and the manner of service of the notice required by their agreement, adopted the provisions of R. L. c. 198, § 5, in relation to notice, there appeared to have been a compliance with the terms of the statute.

TORT against an auctioneer for the alleged conversion of certain furniture belonging to the plaintiff, which was sold at public auction by the defendant, who was employed by one Ginsburg, the assignee of a mortgage on the furniture, and assumed to act under a power of sale contained in the mortgage. Writ in the Municipal Court of the City of Boston dated August 31, 1917.

The facts found by the judge of the Municipal Court are stated in the opinion. At the request of the defendant the judge made the following rulings, which are referred to in the opinion:

"5. That the assignee of the mortgage had a legal right to the possession of the personal property described in the mortgage for a breach of condition by the mortgagor."

"8. That the mortgagee had a legal right to foreclose in the manner provided under the power of sale in the mortgage."

"11. The holder of the mortgage had a legal right to proceed

with the foreclosure in accordance with the power of sale contained in the mortgage.

"12. That the provision of chapter 727 of the acts of 1911, of this Commonwealth [the small loans act], concerning notice of sale to the mortgagor, did not affect the rights of the holder of the mortgage in these proceedings to conduct his sale under the power granted in the mortgage.

"13. A tender of the amount due under the mortgage was not valid unless it was made to the proper party by the mortgagor or a person who was duly authorized by her, or a person having an interest in the property.

"14. That the husband of the mortgagor was not such a person having an interest in the property contemplated by law for the purpose of making a tender."

The judge made the following finding: "I find as a fact and rule as a matter of law, that the notice of foreclosure was not in accordance with the terms of the statute. I find that the plaintiff did not ratify the foreclosure proceedings." He found for the plaintiff in the sum of \$350, and at the request of the defendant reported the case to the Appellate Division. The Appellate Division ordered the entry of judgment for the defendant; and the plaintiff appealed.

*N. Barnett*, for the plaintiff.

*A. E. Rose*, for the defendant.

DE COURCY, J. The plaintiff on May 4, 1917, mortgaged her lodging house furniture to Albert J. Benfield, to secure a loan payable in weekly instalments. The mortgage was assigned to Albert Ginsburg on June 27, 1917. The defendant, an auctioneer, was employed by counsel for Ginsburg to give notice to the plaintiff and to sell the property in accordance with the provisions of the mortgage. Until about June 27, the furniture remained in the possession of the plaintiff at 79 Rutland Street. At that time the assignee, Albert Ginsburg, entered and took possession of it for breach of condition of the mortgage; and the property later was removed to 682 Tremont Street without the knowledge or consent of the defendant or of the plaintiff.

The defendant caused to be published in the Boston Globe of June 30, July 2 and July 9, 1917, a notice that the mortgaged property would be sold at public auction on the premises numbered 79 Rutland Street on Tuesday July 10, at 10 A.M.; the notice



purporting to be signed by "Albert Ginsburg, present holder of mortgage." On July 10 the sale was duly continued to July 13, when the property was sold at public auction to the highest bidder.

The plaintiff brought this action against the defendant as auctioneer for alleged conversion, claiming that the sale was unlawful because not made in compliance with the terms of the mortgage and "the terms and provisions of the law as contained in the statutes." The judge of the Municipal Court (from whose report the foregoing facts are taken), found for the plaintiff. Subsequently the Appellate Division ordered judgment for the defendant; and the plaintiff appealed therefrom.

In support of her contention that the order of the Appellate Division should be reversed, and the decision of the single judge affirmed, the plaintiff argues, among other things, that there was no breach of the conditions in the mortgage; that she made a proper tender of payment; and that the mortgage was invalid as not being in compliance with the small loans act, St. 1911, c. 727. But we must accept the judge's findings on these questions, as all the evidence is not reported. It is apparent from his rulings on the defendant's requests numbered 5, 8, 11, 13 and 14 that the judge found there was a breach of condition, and that no proper tender was made; and from his ruling numbered 12, that the provisions of the small loans act relating to notice were not applicable to the sale in question.

In finding for the plaintiff he expressly states in his report: "I find as a fact and rule as a matter of law, that the notice of foreclosure was not in accordance with the terms of the statute." But the kind of notice of the sale which was necessary was stipulated by the parties. See *Clark v. Simmons*, 150 Mass. 357, 359.

The power of sale in this mortgage provided that "upon breach of foregoing conditions or any of them the grantee may sell all or any of said goods and chattels at public auction, provided that the grantors shall be notified in the manner provided in Section five of Chapter one hundred and ninety eight of Revised Laws of the time and place of any such sale to be made in foreclosure proceedings, at least seven days before such sale." R. L. c. 198, § 5, referred to in the above power, reads as follows: "The mortgagee or his assigns may, after breach of condition and subject to

the provisions of section fifty-four of chapter one hundred and two, give to the mortgagor, or to the person in possession of the property claiming the same, written notice of his intention to foreclose the mortgage for breach of the condition thereof, which shall be served by leaving a copy with the mortgagor or person in possession of the property claiming the same, or by publishing it at least once in each of three successive weeks in one of the principal newspapers, if any, published in the city or town in which the mortgage is properly recorded or in which the property is situated; otherwise, in one of the principal newspapers published in such county."

The reference in said § 5 to the provisions of R. L. c. 102, § 54, has no application to the case before us. The notice with which said § 54 deals is one of intention to foreclose a mortgage of personal property, not by sale, but by notice and sixty days' possession,—as to which see *Reade v. Woburn National Bank*, 211 Mass. 320. In the present case it was the duty of the assignee to notify the plaintiff at least seven days before the foreclosure sale "in the manner provided in" said § 5: that is, either by leaving a copy, or by publication, as above set forth. The defendant duly published the notice in a suitable paper, in a form to which no objection was made.

The contention of the plaintiff that the sale was invalid because the last publication of the original notice did not precede the date of sale by seven days, cannot prevail, in view of the language of the power. The first publication on June 30 was notice; and being more than the required seven days before the date of the sale was in compliance with the terms of the power. *Bell Silver & Copper Mining Co. v. First National Bank of Butte*, 156 U. S. 470. *Magnusson v. Williams*, 111 Ill. 450. *German Bank v. Stumpf*, 73 Mo. 311. *Bailey v. Hendrickson*, 25 No. Dak. 500. The defendant had a right in the exercise of a sound discretion to adjourn the sale, and the adjourned sale when made was in effect the sale of which previous notice had been given. Although he published a notice of the adjourned sale, he was under no legal obligation to do so, provided he acted reasonably and in good faith. *Hosmer v. Sargent*, 8 Allen, 97. *Dexter v. Shepard*, 117 Mass. 480. *Way v. Dyer*, 176 Mass. 448.

As the sale was made under the power contained in the mortgage, the kind and service of notice required were such as the

parties therein stipulated. So far as the terms of the power adopted the provisions of R. L. c. 198, § 5, relating to the notification to be given, there appears to have been a compliance. The defendant had no interest in the mortgage. It was his duty to conduct a proper foreclosure sale as auctioneer, and he was further employed to give notice to the plaintiff in accordance with the provisions of the mortgage. So far as the record discloses he committed no breach of the legal duty which he owed to the plaintiff.

*Order of judgment for the defendant affirmed.*

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CHARLES I. ALEXANDER & others vs. PERCIVAL DOVE.

JAMES H. BRIDE & another vs. SAME.

EPHRAIM A. PEABODY & another vs. SAME.

Essex. October 16, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Frauds, Statute of. Guarantor. Contract, What constitutes.*

In an action for work, labor and materials performed and furnished on a building, where the statute of frauds is pleaded and the defence set up is that the work was performed for a corporation which occupied the building, and that the promise sued upon was an oral promise to pay the debt of another, the judge instructed the jury that the plaintiff could recover only upon the theory that the defendant in the first instance agreed to pay for the work, that he bound himself to pay for it directly and that his obligation was not that of a guarantor, and it was *held* that this instruction was correct.

Where work had been done on a building occupied by a corporation, a statement by a minority stockholder in the corporation, who held no office in it, that "he would see that the bill was paid," is not evidence of a new and independent agreement of the stockholder to pay the bill, and, if it were, the agreement would be without consideration.

Where work was required to be done upon a building occupied by a corporation and a person said to a contractor, who was seeking to do a part of the work, "I am not in on this thing now, but I have got some money coming to me and I am going to put some money into it, and if you consider my word worth anything to you, you can go ahead and do the job, and you will get your money," and where the same person said to the contractor, after the work was done, "that he considered the bill a personal obligation and would pay it himself if the company did n't," in an action against this person by the contractor it

can be found that the defendant made a direct agreement to pay for the work which was not a promise to pay the debt of another.

Where work was required to be done upon a building occupied by a corporation and a contractor desiring to do a part of the work talked with a stockholder in the corporation and another person in reference to the work, and they went to the place where the work was to be done, where the stockholder told the contractor what was to be done, and thereafter the contractor saw this stockholder as the work progressed and talked with him about it, and the stockholder "gave directions as to how the work should be done" and "thought cost plus on an alteration job was the best way to do the work, and all agreed," in an action by the contractor against the stockholder, in which these things appeared, it was held that there was evidence to warrant the submission to the jury of the question whether the defendant made a direct agreement to pay for the work which was not a promise to pay the debt of another.

THREE ACTIONS OF CONTRACT against the same defendant, each for work done and materials furnished at the alleged request of the defendant. Writs dated March 26, 1915.

In each of the cases the defendant's answer, besides a general denial and an allegation of payment, contained the following: "And further answering, the defendant says that the claim set forth in the plaintiffs' declaration is a claim against a corporation known as the Wonderland Amusement Company for labor and materials furnished to said Wonderland Amusement Company upon its own orders and at its request, and that the plaintiffs' attempt to charge him with liability for the claim set forth in the plaintiffs' declaration is an attempt to charge the defendant for the default or misdoing of another, which, not being in writing, signed by the defendant or by someone in his behalf, thereto duly authorized, is void under the statute of frauds of this Commonwealth; and that the defendant was not an officer or director in said Wonderland Amusement Company and had no control over its acts, directly or indirectly."

In the Superior Court the three cases were tried together before *McLaughlin, J.* It appeared that the work and materials were performed and furnished under each of the three contracts upon a building on the easterly side of Broadway in Lawrence known as the Arlington Co-operative Association Building, which was leased to the Wonderland Amusement Company, a corporation, organized under the laws of this Commonwealth for operating a moving picture theatre. The defendant owned one hundred and fifty shares of the capital stock of this corporation of the par value

of \$10 each, the total capital stock being \$10,000. The material evidence in each of the cases is described in the opinion, where also are described the rulings requested by the defendant which were refused by the judge.

The judge submitted the cases to the jury, who returned a verdict for the plaintiffs in each of the three cases, in the case of Alexander and others in the sum of \$643.70, in the case of Bride and another in the sum of \$696.90 and in the case of Peabody and another in the sum of \$1,828.10. The defendant alleged exceptions.

*F. N. Chandler*, for the defendant.

*I. W. Sargent*, for the plaintiffs.

PIERCE, J. These are three independent actions of contract to recover for work, labor and material furnished or performed at different intervals of time, on a building occupied by a business corporation, the Wonderland Amusement Company. The cases were tried together and submitted to a jury under an instruction "to decide each case upon the particular testimony introduced with reference to that case."

There is no question made by the defendant but "that if the plaintiff is entitled to recover in any of these cases he is entitled to recover that amount which the papers in that particular case disclose as the amount which the plaintiff claims." At the close of the evidence the defendant, in each case, requested the judge to direct a verdict for the defendant. In each case, also, the defendant in substance requested the judge to instruct the jury that the plaintiff could not recover because of the statute of frauds, and "That it was the duty of the plaintiffs in the absence of any express statement on the part of the defendant Dove, to ascertain at their peril the person or persons to whom credit for the work to be performed was to be given, and that their thought, without actual investigation upon their part, that the defendant was responsible, does not make him so." In the case of Ephraim A. Peabody and another the defendant requested the judge to rule: "That, upon the testimony of the plaintiffs' witness O'Connell, the plaintiffs having been notified before the completion of the work that the Wonderland Amusement Company was properly liable for the bill, if they elected to go on with the work after that, as they did, they then waived any rights against the de-

fendant, if they ever had any." The judge declined to give any of the rulings requested, and the defendant excepted. No exceptions were taken to the charge which covered fully every contention of the parties. The jury found for the plaintiffs in each action.

In substance, but in varied phrases, the jury repeatedly were instructed that the plaintiffs in any of the cases could not recover upon the theory that the corporation was really indebted to them and that the defendant promised and undertook to pay, in the event the corporation should not pay, the amount which the corporation was obligated to pay; and that the plaintiffs in each action could recover only upon the theory that the defendant did, in the first instance, agree to pay, that he directly obligated himself to pay, and that his obligation is not that of a guarantor, but of an original promisor. These instructions were in accord with the principles of law governing the application of the statute of frauds, R. L. 74, § 1, cl. 2, applied by this court in similar cases. *Swift v. Pierce*, 13 Allen, 136. *Bugbee v. Kendrick*, 130 Mass. 437. *O'Connell v. Mount Holyoke College*, 174 Mass. 511. *Barker v. Thayer*, 217 Mass. 13. *Ribock v. Canner*, 218 Mass. 5. While the work was performed and furnished upon the building of another, the evidence warranted the jury in finding, and we are bound to assume they did find, that no one of the plaintiffs gave any credit to the corporation or to any other person whose obligation to them the defendant undertook to discharge if the corporation, or that person, did not perform its contract.

This disposes of the defence of the statute of frauds, and leaves as the principal remaining question the issue whether there was any substantial evidence to warrant the jury in finding a contract was entered into between these plaintiffs, or any of them, and the defendant.

The evidence in the action of James H. Bride and another, considered apart from the testimony in the other cases, was not sufficient to warrant its submission to the jury. Before the work was performed and the material furnished upon the building of the corporation, neither Bride, nor any one representing him in connection with the work for which he seeks to hold the defendant, ever saw or talked with the defendant in relation to the work, or had any talk or communication with any person who, on the

record, had a real or apparent authority to speak for the defendant, much less to charge him for work and material which was to be delivered to a corporation in which the defendant was a minority stockholder and held no office. The statement of Dove after the work was completed that "he would see that the bill was paid," was not a new and independent agreement between Bride and the defendant; and it was not supported by any valuable consideration, if it were such an agreement. *Conant v. Evans*, 202 Mass. 34. The fact, if it be a fact, that Dove carried on business under the cloak of a corporate name, is immaterial upon this issue.

In the case of Charles I. Alexander and others the jury would be warranted in finding that Dove undertook to be personally responsible for the work which the Alexanders were about to perform from the statement which the jury could find Dove made to Alexander, seeking the job, in these words: "I am not in on this thing now, but I have got some money coming to me and I am going to put some money into it, and if you consider my word worth anything to you, you can go ahead and do the job, and you will get your money," when the above statement was considered in connection with the statement which the jury could find Dove made, when asked to pay after the work was done, "that he considered the bill a personal obligation and would pay it himself if the company did n't." The question is close, but it could not have been ruled as a matter of law that there was no evidence to warrant a submission of that issue of fact to the jury.

In the case of Ephraim A. Peabody and another there is an abundance of evidence to warrant the submission of that issue to the jury. The jury could find that the plaintiffs talked with Dove and another in reference to the work; that they went to the place where the work was to be done; that Dove told the plaintiffs what was to be done; that they saw Dove as the work progressed, — talked with him about it; that he "gave directions as to how the work should be done;" and "that Dove thought cost plus on an alteration job was the best way to do the work, and all agreed."

It is plain the judge rightly could not have instructed the jury that the plaintiffs Peabody, as matter of law, waived any right against the defendant, if notified before the completion of the work that the Wonderland Amusement Company was properly liable for the bill, if they elected to go on with the work after that.

*Swift v. Pierce, supra. Holmes v. Hunt*, 122 Mass. 505. *Bugbee v. Kendricken*, 132 Mass. 349. *Cushman v. Snow*, 186 Mass. 169, 175. The jury were instructed in this regard: "Now, of course, if at that time the Peabodys had begun to look to the Wonderland Amusement Company as their debtor, and from that point on looked to the Wonderland Amusement Company, and not to Mr. Dove, why, then the plaintiffs in the . . . Peabody case could not recover from the time when they began to do work which they were doing for the Wonderland Amusement Company up to the time when they finished their work." This was sufficiently favorable for the defendant.

It follows that in the case of *Bride* the exceptions must be sustained. No reversible error appearing, it follows that in the cases of *Alexander* and of *Peabody* the entry must be, exceptions overruled.

*So ordered.*

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### J. S. LANG ENGINEERING COMPANY vs. COMMONWEALTH.

Suffolk. October 16, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Tax*, On domestic business corporation. *Corporation*, *Tax*. *Trust Company*, Savings department. *Words*, "Securities."

In computing the amount of the franchise tax to be imposed on a domestic business corporation, deposits of the corporation in excess of \$2,000 in the savings departments of trust companies, which can be withdrawn only on presentation of the pass-books in accordance with the provisions of St. 1908, c. 520, § 1, are "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation" and are to be valued accordingly by the Tax Commissioner under St. 1909, c. 490, Part III, § 43.

If by reason of error or misapprehension certain property of a domestic business corporation was omitted by the Tax Commissioner from his valuation under St. 1909, c. 490, Part III, § 43, of the taxable property of the corporation in a certain year, such omission affords no ground for contending that the error cannot be corrected in subsequent years.

PETITION, filed in the Supreme Judicial Court on February 7, 1918, under St. 1909, c. 490, Part III, § 70, by a domestic business corporation, organized on July 10, 1915, under the general laws



of the Commonwealth, for the abatement of the amount of \$639.20 alleged to have been assessed and exacted illegally as a part of the franchise tax imposed upon the petitioner for the year 1917, the valuation complained of being alleged to have included wrongly under § 43 of the statute the sums of money deposited by the petitioner in the savings departments of Massachusetts trust companies, which were treated by the Tax Commissioner as "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation."

The case was submitted to *Carroll, J.*, upon a stipulation of the parties in regard to the facts that would be testified to by the treasurer of the petitioner. The single justice found that the facts set forth in the stipulation were those that would be testified to by the petitioner's treasurer, if material, and, at the request of the parties, reserved and reported the case upon the pleadings, the stipulation and his finding thereon for determination by the full court.

St. 1908, c. 520, § 1, is as follows: "Every trust company soliciting or receiving deposits (a) which may be withdrawn only on presentation of the pass-book or other similar form of receipt which permits successive deposits or withdrawals to be entered thereon; or (b) which at the option of the trust company may be withdrawn only at the expiration of a stated period after notice of intention to withdraw has been given; or (c) in any other way which might lead the public to believe that such deposits are received or invested under the same conditions or in the same manner as deposits in savings banks; shall have a savings department in which all business relating to such deposits shall be transacted."

*C. Bosson*, for the petitioner.

*W. H. Hitchcock*, Assistant Attorney General, for the Commonwealth.

CROSBY, J. This is a petition under St. 1909, c. 490, Part III, § 70, for the abatement of a corporate franchise tax assessed in 1917 upon the petitioner, a domestic corporation, under §§ 40 to 43, inclusive, of that statute. The case is reserved for the determination of this court upon the pleadings, the agreed facts and certain findings of fact.

It appeared from the tax return filed by the petitioner with the

Tax Commissioner on April 1, 1917, that it had on deposit in the savings bank departments of four Massachusetts trust companies sums of money each in excess of \$2,000 and amounting altogether to \$43,218.41. The Tax Commissioner, in assessing the corporate franchise tax due from the petitioner, treated the sums so deposited as "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation." Accordingly in determining the maximum amount of the tax of the petitioner under § 43, he included the amount of such deposits as taxable securities, and did not include them among the deductions provided for by the statute as securities not liable to taxation, and a tax of \$837.36 was assessed. The sole question is whether these deposits are "securities" within the meaning of § 43 of the statute. If they are securities within the meaning of the statute, the tax was legally assessed; otherwise, the petitioner is entitled to a partial abatement.

Under St. 1908, c. 520, trust companies were authorized to establish savings bank departments; and § 1 defines the business to be carried on in such departments. That section of the statute is printed on page 368. Each of the deposits in the savings bank department of the several trust companies was represented by a book in substantially the same form as in ordinary use by savings banks. Each book contained abstracts from the by-laws or rules and regulations of the savings bank department of the respective trust companies, substantially in the following form:

"This book must be presented whenever a deposit is made, or money withdrawn. Should the depositor desire any other person to withdraw money, this book must be sent to the bank together with an order, on a separate paper, and in the form prescribed in the back of the book.

"Money may be usually withdrawn at the pleasure of the depositor but the Trust Company reserves the right to require whenever advisable a ninety day notice in writing of such withdrawals.

"No assignment or transfer of this book will be valid unless recorded on the books of the Company.

"This Company will not be responsible for any payments made on this book in case it is lost or stolen unless notice of such loss or theft has previously been given to the Company in writing."

As the rules above referred to provided that a deposit could be made or money withdrawn only upon the presentation of the book, and as the trust company reserved the right to require "a ninety day notice in writing of such withdrawals," it is plain that the contract between the parties came within clauses (a) and (b) of § 1.

Trust companies having a savings bank department established under St. 1908, c. 520, are required to pay an annual excise tax upon its deposits in that department, assessed at the same rate as that imposed upon regular savings banks upon such deposits as do not exceed in amount the limits imposed upon deposits in savings banks. St. 1909, c. 342, § 1. St. 1911, c. 337, § 1. But it is also provided, St. 1909, c. 342, § 4, that "All deposits taxed under the provisions of section one of this act shall otherwise be exempt from taxation in any year in which said tax is paid."

A deposit in a savings bank is limited to \$2,000 to a single person, including accrued interest (subject to certain exceptions not material to the question under consideration), St. 1908, c. 590, § 46, and as the amount of each of these deposits exceeds the limit allowed savings banks, they were not subject to an excise tax to the trust companies, but they would have been taxable under St. 1909, c. 490, Part I, if owned by a resident of this Commonwealth.

While the amounts which may be deposited in the savings departments of trust companies by a single person are not limited, such deposits are in effect deposits in savings banks conducted by such companies. This is apparent from the rules and regulations before referred to. Such deposits have the incidents of a deposit in an ordinary savings bank. Accordingly if deposits in savings banks are "securities," then § 43 of the corporate franchise tax law applies to these deposits.

The legal status of a deposit in a savings bank which is represented by a book in which the contract between the bank and the depositor is stated, has often been considered by this court.

In *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, at page 432 it was said that "A savings-bank book has a peculiar character. It is not a mere pass-book, or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher,

and the only security he has, as evidence of his debt. . . . The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money."

In *Commonwealth v. Reading Savings Bank*, 133 Mass. 16, it was said at page 22: "The books of a depositor are, it is said in *Pierce v. Boston Five Cents Savings Bank*, *ubi supra*, something more than mere statements of account, and partake of the nature of money securities."

In *McCann v. Randall*, 147 Mass. 81, it was said at page 94, that promissory notes "may be the subject of a gift, either *inter vivos*, or *causa mortis*, and so may savings bank books, and some other evidences of debt." *Slade v. Mutrie*, 156 Mass. 19, 21.

In *Herbert v. Simson*, 220 Mass. 480, it was said that a savings bank book is analogous to a stock certificate in many respects.

In *Boston Railroad Holding Co. v. Commonwealth*, 215 Mass. 493, it was held that cash on deposit in a national bank or trust company, standing to the credit of a domestic business corporation, was not included in the word "securities" under St. 1909, c. 490, Part III, § 43. In the opinion in that case it was said at pages 496 and 497, "Neither do we think that it is included in the term 'securities.' It is not like money on deposit in a savings bank which is represented by a book containing the contract between the depositor and the bank which may be fairly said to be a security. In its ordinary acceptation the word 'securities' includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness or of property, and not mere choses in action."

While the question in the case at bar was not before the court in the case of *Boston Railroad Holding Co. v. Commonwealth*, *ubi supra*, and the language quoted was not necessary to the decision of that case, still we are of opinion that it is a correct statement of the law. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 65.

It cannot be doubted that books representing deposits in savings banks are evidences of indebtedness or property, and have been so considered in many cases decided by this court; and that the deposits in question are not mere choses in action, but plainly

come within the definition of "securities" as that word is used in § 43 of the corporate franchise statute.

If some person connected with the office of the Tax Commissioner stated to the petitioner in 1916 that, in view of its deposits in savings departments of trust companies, its tax would be less than \$100, such statement cannot be held to affect the tax actually due upon a correct assessment; nor is the fact, that in computing the tax of the petitioner for the year 1916 the deposits in question were not treated as securities, material. If by reason of error or misapprehension the tax due from the petitioner in 1916 was incorrectly assessed, there is no reason why the error could not be corrected in assessing the tax in question. *Mutual Benefit Life Ins. Co. v. Commonwealth*, 227 Mass. 63, 66.

The tax was correctly assessed; and the entry must be

*Petition dismissed with costs.*

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WILLIAM T. HILL vs. CITY OF BOSTON.

Middlesex. October 17, 1918. — November 27, 1918

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Way, Public: defect.*

In this Commonwealth it is settled that the mere failure of a city to provide and maintain proper lights in its streets is not a defect under the highway act, even if the way unlighted is dangerous.

If a city maintains as a public way an underground passageway, where no natural light can reach it, a failure to light a staircase forming a part of the way, by reason of which a traveller thereon is injured, does not give such traveller a right of action under R. L. c. 51, § 18.

TORT under R. L. c. 51, § 18, for personal injuries sustained by the plaintiff on November 10, 1916, by reason of an alleged defect in a public way maintained by the defendant, called an underpass, leading underground from Haverhill Street to Canal Street in the city of Boston. The declaration alleged that the "passageway was dangerous and defective because of . . . being insufficiently lighted" and alleged that due notice of the time, place and cause of the plaintiff's injury was given to the defendant. Writ dated December 7, 1916.

In the Superior Court the case was tried before *Quinn, J.* There was evidence from which the jury could find that the plaintiff was injured by the accident. At the close of the plaintiff's evidence, which is described in the opinion, the defendant made a motion asking the judge to order a verdict for it. Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

*G. S. Harvey & R. S. Hartstone*, for the plaintiff.

*W. P. Higgins*, for the defendant.

*PIERCE, J.* This is an action of tort to recover damages for injuries sustained by the plaintiff on November 10, 1916, at about 4:55 P. M., while a traveller in an underground passageway in the defendant city, which was duly laid out and maintained by the defendant as a public way. The accident was caused by the plaintiff falling near the bottom of a flight of steps. He testified, "that as he got down very near the bottom, within two steps, that it was quite dark, that there appeared to be a shadow there; that he thought he had arrived at the bottom of the steps; that he stepped right off, and that instead of being at the bottom he was two or three steps above; that, there not being any light there, it cast a shadow; that he sprawled all over the ground of the subway, . . . that he never before had used that underpass after dark, . . . that the underpass . . . was so arranged as to provide for three electric lights over said stairs; that on this particular night there was no light there at all; that the first electric light that was lighted that night was in the passageway at right angles from the stairs and was quite a ways along from the foot of said stairs; that there were no electric lights near the stairway."

There was no evidence of any defect or obstruction in the passageway or upon the stairway. But the plaintiff contends that the passageway, by reason of the fact that it was entirely covered over and could be found to be "continuously dark; no lights at all; absolutely no artificial light," was not reasonably safe and convenient for travellers.

Whatever may be the measure of duty of a municipality to erect and maintain barriers and lights to warn and to guard against defects and obstructions in public ways, it is settled in this Commonwealth that the mere failure to provide and maintain

proper lights in its streets is not negligence under the highway act, even if the way unlighted be dangerous. *Sparhawk v. Salem*, 1 Allen, 30, 32. *Randall v. Eastern Railroad*, 106 Mass. 276. *Monies v. Lynn*, 119 Mass. 273, 275. *Lyon v. Cambridge*, 136 Mass. 419. *Spillane v. Fitchburg*, 177 Mass. 87, 88. *Dickinson v. Boston*, 188 Mass. 595.

In the circumstances disclosed by the evidence for the plaintiff, this case cannot be distinguished from the cases above cited.

*Exceptions overruled.*

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STANDARD TIRE AND RUBBER COMPANY vs. A. L. RICHARDSON  
AND BROTHERS, INCORPORATED.

Suffolk. October 17, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, Of tenant of upper floor of building, In regard to sprinkler system.*

A tenant of the fifth floor of a building owned and maintained there a platform for storing property, which was raised seven feet above the floor. His servants removed a twelve inch beam, which rested on the floor and supported one corner of this platform and left that corner supported by two pieces of joist, two inches by four inches, one of them five feet long and the other two feet long, superimposed on the first, end for end, without their being fastened together, and both resting against the wall. Later the owner of the building, having been ordered by the authorities to do so, placed a sprinkler system on this floor, which included two and one half inch pipes for carrying water. One of these pipes was attached by two spikes to a timber which held up one end of the platform. Later the two foot joist, mentioned above, fell to the floor and let down one corner of the platform, which caused the sprinkler water pipe to break and to flood the floor, causing damage to the property of another tenant on the floor below, who brought an action for this damage against the tenant of the fifth floor. It appeared that the defendant took no part in the installation of the sprinkler system, was not consulted about attaching the pipe to the timber holding up one end of the platform and was not given any control over or responsibility for the repair of the system after it was installed. It also appeared that some vibration of the building was caused by the operation of laundry machinery by the defendant but that this was no greater after the sprinkler system had been put in than before. A trial judge found for the defendant. *Held*, that it was a question of fact, whether on all the evidence the damage was due to negligence, and, if so, whether the negligence was that of the defendant, and that the finding of the trial judge in the defendant's favor on that issue would not be disturbed.

TORT for injury by water to the plaintiff's goods at the premises occupied by him at 104-106 Portland Street in Boston on October

19, 1916, alleged to have been caused by the negligence of the defendant. Writ in the Municipal Court of the City of Boston dated December 29, 1916.

At the trial in the Municipal Court the facts which are stated in the opinion were found by the judge upon the plaintiff's evidence. At the close of the plaintiff's evidence the judge stated that he would hear the plaintiff in regard to its right of action. Thereupon the plaintiff asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is entitled to a finding.

"2. The tenant in occupancy and control of premises is bound to maintain them in such condition that damage will not result to others.

"3. The immediate cause of the damage was the falling of the platform which was in the control of the defendant, and liability will stop with the tenant, whose intervening wrong was the immediate cause of the damage."

The judge refused to make the first ruling requested and, as to the second and third rulings requested, denied the requests in view of the facts found by him.

The judge found for the defendant, and at the request of the plaintiff reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed; and the plaintiff appealed.

*J. E. Crowley*, for the plaintiff.

*S. W. Mendum*, for the defendant.

DE COURCY, J. The following material facts appear in the report of the trial judge. The plaintiff as tenant occupied the third and fourth floors of a building on Portland and Chardon streets in Boston. The defendant, under a written lease, occupied the fifth floor of the building, directly over the premises of the plaintiff. In the premises of the defendant was a platform or balcony, eight feet wide and forty feet long, raised about seven feet above the floor. This belonged to the defendant and was used for storing property. Some time before the events herein-after mentioned a twelve inch beam, which rested on the floor and supported a corner of the platform, was removed by the defendant's agents, leaving one corner supported by two pieces of two inch by four inch joist, one of them five and the other two feet



long. These were superimposed end for end, but not fastened together, and rested against the wall.

About eight months after this change the owner of the building, under the order and directions of the fire prevention commission, placed a sprinkler system in the premises occupied by the defendant. It included two and one half inch pipes for carrying water; and one of these pipes was attached by two spikes to a timber holding up one end of the platform. Three or four months later the two foot joist, above described, fell to the floor, and caused one corner of the platform to drop, and break the sprinkler water pipe. A large quantity of water was discharged, and penetrated to the third floor of the building, damaging the property of the plaintiff. The plaintiff's claim to recover for that loss is based on the alleged negligence of the defendant.

The judge's finding imports that the defendant was not negligent as matter of fact; and there was no error in the refusal to give the plaintiff's second and third requests. The first request was denied rightly unless on the facts found it must be said as matter of law that the damage complained of was caused by the defendant's negligence. Some vibration of the building was caused by the operation of its laundry machinery, but it was no greater after the sprinkler system was put in than before. The order given to equip the building with automatic sprinklers was directed to the owner, and not to the tenant. See St. 1914, c. 795, §§ 10, 12. Under the terms of the defendant's lease the owner (lessor) had a right to enter the leased premises and make repairs and alterations, and did in fact install the water pipe which later was broken. So far as the evidence discloses, the defendant took no part in the installation of the sprinkler system, was not consulted about attaching the pipe to the timber holding up one end of the platform, and was not given any control over or responsibility for the repair of the system after it was installed. Looking back after the accident, it may appear that the platform support which fell was insecure; but it had served for a year, including three or four months after the sprinkler system had been completed, and it does not appear that during that period the defendant had notice that it was inadequate or unsafe. It was a question of fact whether on all the evidence the damage was due to negligence, and, if so, whether the negligence was that of the defendant; and the trial

judge decided that issue in the defendant's favor. *Poor v. Sears*, 154 Mass. 539. *Feeley v. Doyle*, 222 Mass. 155. *Hilden v. Naylor*, 223 Mass. 290.

What we have said disposes of the questions raised by the appeal to the Appellate Division. St. 1912, c. 649, §§ 8, 9. The judge may have found that the damage was caused by actual negligence on the part of the landlord or his agent in attaching the water pipe where and as he did; and cases like *Wixon v. Bruce*, 187 Mass. 232, are not applicable.

*Order dismissing the report affirmed.*

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ELLEN G. FARDY vs. H. AUGUSTINE BUCKLEY & another.

Middlesex. October 17, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Equity Jurisdiction*, To cancel note and mortgage, Fraud, For an accounting. *Fraud*, By failure to disclose material fact. *Agency*, Duty of fidelity. *Equity Pleading and Practice*, Alternative relief.

In a suit in equity by a woman against her sister and her sister's husband to set aside a note and a mortgage given by the plaintiff to the defendants, it appeared that the plaintiff was the forewoman of a laundry, who never had bought any real estate before and had no knowledge of business except that connected with the laundry, that the defendant brother-in-law was engaged in the real estate business, in which his wife helped him, that the defendant sister told the plaintiff that, if the plaintiff had money to invest, they had a new house which could be bought at a sacrifice, that, if the plaintiff put her money into the house, she would double it in three years provided "she left it in," that, induced by the advice of the defendants, the plaintiff bought the equity in the house, subject to two mortgages, and gave the defendants her note for \$950 and a third mortgage on the house to secure it, that the defendants had bought the house recently for about \$1,000 less than the price at which they sold it to the plaintiff and that they failed to disclose to the plaintiff the price they had paid, and she remained ignorant of it until after the whole transaction was completed, that the defendant brother-in-law, with the knowledge of his wife, acted as the plaintiff's confidential adviser in the purchase and management of the property and collected the rents for her. *Held*, that the failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants to disclose to the plaintiff every material fact which affected the value of the property or which might induce or determine her action.

In the case above described a master found "that the defendants did not fraudu-

lently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," and it was *held* that, in view of the other facts found, this finding was immaterial, as, where such fiduciary relations exist, the duty to disclose does not depend on the motives or intentions of the persons whose duty it is to make the disclosure.

In the same case it was *held* that it also was irrelevant that the property might have been worth at the date of the sale more than the plaintiff paid for it.

In the suit above described the bill contained a prayer for general relief, and it was *said*, that the plaintiff not only had the right of rescission, but, if she elected to keep the property, might have the defendants ordered to account to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her.

BILL IN EQUITY, filed in the Superior Court on September 21 and amended on December 12, 1917, by the owner of the equity in a certain house and lot of land on Lambert Street in Medford, against her brother-in-law and her sister, his wife, praying that the defendants be ordered to surrender to the plaintiff a certain mortgage note signed by her and to execute and deliver to her a discharge of the mortgage on her house and lot securing the note, that an account be taken of what the defendants owed the plaintiff for rents collected out of the property, and for further relief. The amendment referred to above added to the bill the following allegations: "The defendants concealed from the plaintiff the fact that they had purchased said property a short time before for approximately eight hundred dollars and that they made a large profit, approximately eleven hundred and fifty dollars, by selling said property to the plaintiff, who relied wholly upon the advice of the defendants in purchasing it and did not know that the defendants were making any profit by selling it to her."

The case was referred to a master, who filed a report and, after a recommittal of the case to him, filed a second report, to which no exceptions were filed. The material findings contained in the reports of the master are stated in the opinion. The case was heard by *Wait, J.*, who made an interlocutory decree ordering that the reports of the master be confirmed and that the bill be dismissed. Later, by order of the judge, a final decree was entered dismissing the bill with costs to the defendants. The plaintiff appealed.

*J. F. Daly*, for the plaintiff.

*F. L. Norton*, for the defendants.

PIERCE, J. This is an appeal from a final decree dismissing the plaintiff's bill in equity seeking the cancellation of a promissory note given by the plaintiff to the defendants for \$950 and of a mortgage to secure the payment thereof given on certain real estate. The bill also contained a prayer for general relief.

The cause was referred to a master; his report was confirmed and no exceptions thereto are filed. He has found that at the time of the transaction in question, the plaintiff and the defendant Catherine were sisters; that Catherine was the wife of the defendant H. Augustine Buckley; that the husband, the wife assisting him, was and had been for years engaged in the real estate business; that the husband and wife by deed dated June 23, 1914, became the owners of the equity in the premises which they conveyed to the plaintiff on October 31, 1914; that at the time of their purchase and between that date and their sale of the property to the plaintiff the defendants paid for it \$5,491.42; that the defendant Catherine, at the end of the summer of 1914, had an interview with the plaintiff at the plaintiff's house while on a social visit; that at this interview Catherine told the plaintiff that if she had money to invest they had a new house which could be bought at a sacrifice; that if the plaintiff put her money in she would double it in three years provided "she left it in;" that a second interview took place at the house of the defendants and both defendants were present; that Catherine told the plaintiff that other parties were after the house, that it paid \$64 or \$65 per month, that it was a good investment; that she advised the plaintiff to take it; that the defendant husband told the plaintiff the price of the house was \$6,500, that there were two mortgages then on the house — a first mortgage of \$3,000, and a second mortgage of \$1,550; that there was a talk that the plaintiff should invest \$2,000 in cash; that the plaintiff finally said she would only put in \$1,000; that Mrs. Buckley then told the plaintiff that there would have to be a third mortgage of \$950; that it was understood nothing was to be done with the third mortgage until such time as the plaintiff was able to make payments on it; that it was to be laid one side; that she was not to be troubled about any payments on principal or interest until she was able to make them; that the parties came to an agreement on the above terms; that on October

31, 1914, at the request of Mr. Buckley, the plaintiff met him at the registry of deeds and was there delivered a deed of the premises signed by the defendants, which was "Subject to a mortgage of \$3,000 . . . [and] also one of fifteen hundred and fifty (\$1,550) dollars;" that Mr. Buckley produced at the registry the mortgage note of \$950, and the mortgage to the defendants; that the plaintiff read them in a hasty and perfunctory manner and signed them; that the transaction made little impression on the mind of the plaintiff; that Buckley took the plaintiff into the record hall, showed her some of the record books, then took her to his house to dinner, and then drove her to a bank where she drew \$1,000, which she immediately paid over to him.

The master further found that the plaintiff was then employed as a "forelady" in a laundry; that she had never bought any real estate before and had had no business experience outside of her position in the laundry; that she had not seen the interior of the house before she purchased it, nor did she see the interior until some months later; that Mr. Buckley told her that it might make some difference with the tenants if she went inside the house; that she placed entire confidence in her sister and brother-in-law, relied upon their judgment, and believed that they were looking out for her interest and would continue to do so; that the plaintiff did not know what the purchase price of the property was; that Mr. Buckley concealed, and Mrs. Buckley did not conceal, the amount of the purchase price; that neither defendant disclosed to the plaintiff the purchase price paid by them; that they did not fraudulently conceal any material fact from the plaintiff, and did not make any false or fraudulent statements to her.

The master found as a fact, the bill charged and the answer admitted, that "the defendant H. Augustine Buckley, who was the brother-in-law of the plaintiff, with the knowledge of the defendant Catherine B. Buckley, who is his wife and the plaintiff's sister, acted as the plaintiff's confidential adviser in the sale and management of said property and undertook and did collect the rents thereof for the plaintiff and take charge of and manage said property for her."

The sole question presented by the appeal is whether the non-disclosure by the defendants of the purchase price entitles the

plaintiff to relief in this bill. The relation of trust and confidence being established by the finding of the master and by the express admission of the defendants, the duty was upon the defendants to disclose every material fact which affected the value of the property which they sought to sell to the plaintiff, or which might to any substantial degree induce or determine her action. *Fox v. Mackreth*, 1 White & Tudor's Lead. Cas. in Eq. (4th Eng. ed.) 115, 171, note. *Tate v. Williamson*, L. R. 2 Ch. 55. *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918, 937. It is plain in such a suit as this the price which has been recently paid for property, especially that which has been paid for property which is offered for sale "at a sacrifice," is or may be a most cogent and persuasive material fact in the determination of the mind of the offeree to a course of action. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 327. The finding of the master "that the defendants did not fraudulently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," in view of the other facts found, is an immaterial and irrelevant finding, as the duty to disclose, where fiduciary relations exist, rests upon reasons which are not concerned with motives and intentions or with the personal dishonesty or other moral obliquity of the person who comes within the equitable rules. Bower on Actionable Non-Disclosure, § 461, and cases cited. It is equally irrelevant that the property for which the plaintiff paid \$6,500 may have been worth at the date of sale \$7,000, or any other sum which will show a gain to the plaintiff. *Hamilton v. Wright*, 9 Cl. & Fin. 111, 123. *Parker v. McKenna*, L. R. 10 Ch. 96, 118.

Undoubtedly it was the right of the plaintiff at law to rescind the transaction or, retaining the property, seek damages for any fraudulent misrepresentation of fact. In the choice of remedies she also has the right to resort to equity for a rescission, or, if she shall elect to keep the property, to have the defendants account to her for their secret profit. In a word, the plaintiff is entitled to keep the property at the price which it had cost the defendants when it was conveyed to the plaintiff. *Tyrrell v. Bank of London*, 10 H. L. Cas. 26. *Hichens v. Congreve*, 4 Sim. 420, 428. *Gluckstein v. Barnes*, [1900] A. C. 240, 251. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 320. *Hawkes v. Lackey*, 207 Mass. 424, 432, 433.

It follows that the decree of the Superior Court must be reversed, with costs, and a decree conformable to this opinion entered for the plaintiff; and it is

*So ordered.*

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JEREMIAH J. HARTNETT vs. CHARLES E. TRIPP.

Middlesex. October 18, November 11, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, Contributory, Motor vehicle, Violation of statute. Damages, In tort. Proximate Cause.*

A policeman, who was travelling on a street railway car that was running on a single track, looking for a team that was being driven on the highway without a light in violation of St. 1916, c. 30, when the car was on a switch or turnout and near the end of it, saw the wagon he was looking for coming toward him and told the motorman to stop the car. The car was stopped and the policeman stepped off backward and closed the door. Before he stepped off he looked both up and down the street and saw nothing coming, then stepped down off the car and told the motorman to go ahead, and, before the car started he was struck and knocked down by a motor car from which he heard no signal. He was standing as close as he could to the car from which he had alighted and had been on the ground only from four to ten seconds when he was hit. In an action against the owner and driver of the car for his injuries thus sustained, in which the negligence of the plaintiff was set up as a defence, it was held that it could not have been ruled as matter of law that the plaintiff was negligent.

In the case above referred to it could have been found that the defendant saw or ought to have seen the car stop for the plaintiff to alight from it and that reasonable care required him to have his motor car under such control that he could have stopped it in time to avoid the accident. There was evidence that he ran his motor car within two feet of the street railway car when there was ample space in the highway to have passed without hitting the plaintiff. Held, that the jury might find that the defendant violated the part of St. 1909, c. 534, which provides that "In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down and if it be necessary for the safety of the public he shall bring said vehicle to a full stop," and that, if the defendant violated this statute, it was evidence of his negligence.

In an action for personal injuries caused by the negligence of the defendant in knocking down the plaintiff with a motor car, it appeared that the femur of the plaintiff's right leg was broken by his fall, and that after remaining in bed at a hospital for about nine weeks he was able to get up by the use of crutches and to sit in a wheel chair. There was evidence that when he was attempting to get out of the chair one of his crutches slipped and he fell back into the

chair, breaking the same bone at the place of the original fracture. The defendant excepted to the evidence relating to this second fracture. *Held*, that the evidence was admitted properly, as the jury could find that the second fracture was a natural and proximate result of the first injury.

TORT for personal injuries sustained by the plaintiff, a police officer of the city of Medford, on August 7, 1914, from being knocked down on Winthrop Street in Medford by a motor car operated negligently by the defendant. Writ dated August 17, 1915.

The answer, besides a general denial, contained an allegation of contributory negligence of the plaintiff.

In the Superior Court the case was tried before *Quinn, J.* The evidence is described in the opinion. Before the introduction of the evidence concerning the second breaking of the plaintiff's leg, mentioned in the opinion, the defendant seasonably objected to any evidence being introduced regarding the second breaking and its consequences. The judge admitted the evidence subject to the defendant's exceptions.

At the close of the evidence the defendant made a motion asking the judge to order a verdict for him. The judge denied the motion. The defendant then asked the judge to make certain rulings, which are held by this court to have been covered by the judge's charge so far as they properly could have been given. The jury returned a verdict for the plaintiff in the sum of \$7,000; and the defendant alleged exceptions.

*W. B. Sprout, F. B. Kendall & C. Brewer*, for the defendant, submitted a brief.

*J. J. Donahue*, for the plaintiff.

CROSBY, J. The plaintiff, a police officer of Medford, on the evening of August 7, 1914, boarded an electric car in that city and stood upon the front platform. He was looking for a team that was being driven along the highway without a light attached to it (St. 1916, c. 30), and testified that he so stated to the motorman. He further testified that while he was on the car it stopped at a switch to enable the conductor to get off and adjust a signal; that it started again, and when near the end of the switch he saw the wagon coming toward him and told the motorman to stop the car; that the car was stopped and he stepped off backward and closed the door; that before he stepped off he



"looked in both directions up and down the street and saw nothing coming . . . then . . . [he] stepped down off the car and told the motorman to go ahead;" that the car did not start from the time he stepped upon the ground until he was struck from behind by the automobile; that he had been on the ground from four to ten seconds before he was hit; that at that time he was standing as close to the car as he could get; and that he heard no signal from the automobile. Upon this evidence it could not have been ruled that the plaintiff was not in the exercise of due care.

It is equally plain that there was evidence of negligence on the part of the defendant. It could have been found that he saw or ought to have seen the car come to a stop when the plaintiff alighted, and that reasonable care required him to have had his machine under such control that he could have stopped it in time to have avoided the accident. There was evidence that he ran the automobile within two feet of the car, although it could have been found that there was ample space in the highway for him to have passed it and thereby avoided hitting the plaintiff. If the jury were satisfied upon the evidence that the car stopped to allow the plaintiff to alight, and the defendant knew it, or in the exercise of reasonable care ought to have known it, there was evidence that he violated that part of § 14 of St. 1909, c. 534, which provides that "In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down and if it be necessary for the safety of the public he shall bring said vehicle to a full stop." If the defendant violated this provision of the statute, it was evidence of negligence.

As a result of the accident the plaintiff received a fracture of the femur of his right leg, and was taken to a hospital where he remained in bed for about nine weeks; at the end of that time he was able to get up by the use of crutches and sit in a wheel chair. There was evidence that in getting out of the chair one of his crutches slipped and he fell back into the chair, breaking his leg at the place of the original fracture. The evidence relating to this second fracture was admitted by the presiding judge upon the question of damages, subject to the exception of the defendant. It is plain that the evidence was admitted properly.

While a wrongdoer cannot be charged with liability for the result of a separate, independent and intervening act for which he is in no way responsible, he is liable for the direct and proximate result of the first injury. The second injury, caused by the slipping of the plaintiff's crutch, could have been found to have had a causal relation to the original injury for which the defendant would be liable. It does not appear that the plaintiff acted carelessly or improperly; he had so far recovered from his first injury that he was permitted to use crutches, although still being treated at the hospital. In attempting to get out of the chair with the aid of his crutches, he was performing a natural and necessary act, which it could not be ruled was negligent or so distinct from his original injury as to be a separate and independent act. The presiding judge clearly and accurately instructed the jury that the plaintiff could not recover for the second fracture as an element of damages unless they were satisfied that it was a natural and proximate result of the original injury. *Walker v. Gage*, 223 Mass. 179. *Gray v. Boston Elevated Railway*, 215 Mass. 143. *Larson v. Boston Elevated Railway*, 212 Mass. 262. *Sullivan v. Boston Elevated Railway*, 185 Mass. 602. *McGarrahan v. New York, New Haven, & Hartford Railroad*, 171 Mass. 211.

The case at bar is plainly distinguishable from *Raymond v. Haverhill*, 168 Mass. 382, *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, *Snow v. New York, New Haven, & Hartford Railroad*, 185 Mass. 321, and similar cases cited and relied on by the defendant.

An examination of the requests for rulings made by the defendant shows that they were covered by the charge so far as they properly could have been given.

As we perceive no error in the conduct of the trial, the entry must be

*Exceptions overruled.*

## COMMONWEALTH vs. A. EMILE THEBERGE.

Bristol. October 28, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Motor Vehicle. Municipal Corporations. License. Way, Public: State highway.*

A town which has accepted St. 1916, c. 293, giving authority to license motor vehicles carrying passengers for hire, may pass a regulation requiring a license fee and a deposit of security by bond or otherwise with the town treasurer for "jitneys" which pass through the town without taking on or letting off passengers there as well as for vehicles whose "fixed and regular termini" are within the town limits.

In such a regulation a nominal license charge of \$1 is a fee and not a tax on property.

In such a regulation the requirement of the deposit with the town treasurer of a bond in the penal sum of \$2,500 is not unreasonable.

The Commonwealth, which has power to regulate the use of the State highways, can delegate the administration of such powers to cities and towns which under St. 1917, c. 344, Part I, §§ 17, 21, contribute toward the repair and maintenance of the State highways and are given police jurisdiction over them.

COMPLAINT, received and sworn to in the Third District Court of Bristol on July 14, 1917, charging that the defendant at Dartmouth on June 30, 1917, did unlawfully engage in the business of transporting passengers for hire through the town of Dartmouth by means of a certain motor vehicle, without first having obtained from the selectmen of said town of Dartmouth a license for said vehicle.

In the Superior Court the defendant was tried before *Raymond, J.*, upon an agreed statement of facts, containing the facts that are stated in the opinion. The defendant asked the judge to rule, "that the defendant cannot be convicted upon the agreed facts." The judge refused to make this ruling, and the jury returned a verdict of guilty. At the request of the defendant the judge reported the case to this court for determination of the question raised by his refusal to make the ruling requested.

St. 1916, c. 293, is as follows:

"Section 1. Cities and towns shall have authority to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor

vehicle, except the trackless trolley vehicle, so called, not running on tracks or rails, and may impose reasonable license fees, make regulations for the operation of such vehicles within their own limits, and imposing suitable penalties for the violation of such regulations: provided, however, that no such motor vehicle shall be operated as aforesaid until the licensee of the vehicle, in addition to complying with all regulations of the city or town in which the vehicle is to be operated, shall have deposited with the treasurer of any city or town in which a license has been taken out, security by bond or otherwise, approved by the city or town treasurer, in such sum as the city or town may reasonably require, conditioned to pay any final judgment obtained against the principal named in the bond for any injury to person or property, or damage for causing the death of any person, by reason of any negligent or unlawful act on the part of the principal named in said bond, his or its agents, employees or drivers, in the use or operation of any such vehicle. Any person so injured or damaged may sue on the bond in the name of the city or town treasurer, and damages so recovered shall go to the person injured or damaged.

"Section 2. Nothing in this act shall be construed as requiring the licensee to file more than one bond, which shall be filed in any city or town in which a license has been taken out.

"Section 3. This act shall take full effect in cities upon its acceptance by the city council, and in towns upon its acceptance by the voters of the town at any duly called town meeting. For the purpose of submitting this act to cities and to towns, it shall take effect upon its passage."

St. 1917, c. 344, Part I, §§ 17 and 21, are as follows:

"Section 17. A city or town in which a State highway lies shall at its own expense keep such highway sufficiently clear of snow and ice to be reasonably safe for travel. It shall have police jurisdiction over all State highways within its limits, and shall forthwith give notice in writing to the commission or its employees of any defect or want of repair in such highways; but it may make necessary temporary repairs of a State highway without the approval of the commission."

"Section 21. Said commission shall annually, in January, certify to the Treasurer and Receiver General the amount of ex-

penditures for repair of State highways in each city and town during the preceding year. One half the amount of such expenditures, not exceeding fifty dollars a mile in towns with a valuation of less than one million dollars, and not exceeding one hundred dollars a mile in towns with a valuation of one million dollars and less than two million dollars, not exceeding two hundred dollars a mile in towns with a valuation of two million dollars and less than five million dollars, and in cities and towns with a valuation of over five million dollars the said one half of such expenditures, not exceeding two thousand dollars a mile in the aggregate and not exceeding five hundred dollars a mile in any one year, shall be made a part of the State tax for such cities and towns, respectively, and any balance due may be made a part of the State tax in the succeeding three years; but when such expenditures exceed one thousand dollars a mile in any one year on any particular mile of road, the amount to be collected on account of such expenditures shall be computed only for the number of miles actually so improved. Said expenditures shall include all moneys expended for the above purpose from whatever source received, and when collected shall be available for use for repair and maintenance of State highways in addition to any other money that may be available therefor. If a city or town elects to make such repairs upon terms and prices agreed upon by it and said commission and under the direction of said commission, the commission shall repay to it, from the annual appropriation for State highways, the amount expended therefor in excess of the amount which such city or town is required to repay under this section."

The case was submitted on briefs.

*D. R. Radovsky*, for the defendant.

*J. T. Kenney*, District Attorney, & *G. H. Potter*, for the Commonwealth.

DE COURCY, J. In June, 1917, the town of Dartmouth duly accepted St. 1916, c. 293, which authorizes the licensing by cities and towns of motor vehicles carrying passengers for hire; and adopted regulations thereunder, § 1 of which is as follows:

"No person shall engage in the business of transporting passengers for hire within or through the Town of Dartmouth by means of any motor vehicle without first obtaining from the

selectmen a license for each vehicle and the fee for such license shall be one dollar per annum; provided, however, that no such motor vehicle shall be operated as aforesaid until the licensee of the vehicle shall have deposited with the town treasurer security, as provided by law, by bond or otherwise in the sum of twenty-five hundred dollars."

It appears from the agreed facts that on June 30, 1917, the defendant was the owner and operator of a "jitney," and carried passengers for hire between the cities of New Bedford and Fall River, running regularly. On his trips over the State highway he passed through the towns of Dartmouth and Westport, which lie between those cities, but did not solicit trade, nor take on nor let off passengers, within those towns. He had been granted a license to operate a "jitney" in New Bedford and in Fall River, but neither city had accepted St. 1916, c. 293. He had not been licensed in the town of Dartmouth; and this complaint is for violation of the above regulation of that town. The trial judge refused to rule "that the defendant cannot be convicted upon the agreed facts;" and, after a verdict of guilty, reported the case to this court.

The facts unquestionably bring the defendant within the language of the regulation under consideration. His contention is that the regulation is invalid. The constitutionality of the statute, (St. 1916, c. 293,) conferring upon cities and towns the power to license and regulate the transportation by motor vehicles of passengers for hire, is no longer open to question. *Commonwealth v. Slocum*, 230 Mass. 180, and cases cited. The only new element in the present case is the application of the by-law to persons transporting passengers for hire through the town, and not merely within it. Ordinarily municipalities, in regulating motor vehicles which run "between fixed and regular termini," will deal mostly with "jitneys" doing a local business. But § 2 of the statute provides that, "nothing in this act shall be construed as requiring the licensee to file more than one bond, which shall be filed in any city or town in which a license has been taken out;" and § 1 expressly limits the authority of the municipalities to the operation of such vehicles "within their own limits." It seems to us that the necessary implication from this language is, that the Legislature intended to make "jitneys" which pass

through a town amenable to control, as well as those whose "fixed and regular termini" are within the municipality. Even under the earlier statute (R. L. c. 25, § 24) authorizing the regulation by cities and towns of "carriages and vehicles used therein," it seems to have been taken for granted that the ordinances were applicable alike to those doing an interurban and those doing a local business. *Commonwealth v. Beck*, 194 Mass. 14. *Commonwealth v. Mulhall*, 162 Mass. 496. One purpose of the statute, if not the main one, was the protection from injury of persons properly using the public ways; and the Legislature well may have considered that one frequent and serious cause of danger is the reckless or careless automobilist rushing through country towns. The town did not exceed the power given to it by the statute in adopting the regulation in question.

Nor can the regulation be condemned as an unreasonable exercise of the power delegated. No discrimination is made against non-residents. The nominal license charge of \$1 is a fee, and not a tax on property. The bond of \$2,500 cannot be condemned as unreasonable in amount, in view of the fact that it is designed to furnish security for injuries to person or property, or damages for death, caused by the negligent or unlawful act of the principal named in the bond or his agents or servants. *Commonwealth v. Page*, 155 Mass. 227.

There is nothing in the defendant's contention that the regulation is in violation of St. 1909, c. 534, § 17. It does not exclude motor vehicles from any State highway, but merely regulates their operation and use. And the Commonwealth, which has power to regulate the use of the State highways, can delegate the administration of such powers to cities and towns which contribute toward their repair and maintenance and are given police jurisdiction over them. St. 1917, c. 344, Part I, §§ 17, 21. *Commonwealth v. Kingsbury*, 199 Mass. 542. *Dudley v. Northampton Street Railway*, 202 Mass. 443.

*Verdict to stand.*

## ISRAEL POKROSS vs. LOUIS CHAMPAGNE.

Bristol. October 28, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Replevin. Tender. Mortgage, Of personal property: redemption.*

In an action of replevin against the mortgagee of a chattel which the plaintiff has the right to redeem upon a proper payment or tender, it *seems* that a tender made at the time that the chattel is taken upon the replevin writ comes too late, as the writ already has been issued, and in the present case, where there was a previous valid tender, a further tender at the time of the service of the writ was disregarded by this court.

Where, for the purpose of redeeming a motor car from a mortgage, the mortgagor attempts to pay, not only the amount of the mortgage debt and interest, but also the amount of a bill for painting the car which the mortgagor has agreed to pay, but the mortgagee, in order to prevent the redemption, himself pays the painter's bill, which he does not owe, before the mortgagor can get a chance to pay it, this may be found to be a waiver by the mortgagee of the payment of the painter's bill by the mortgagor, and the tender by the mortgagor of the principal and interest of the debt entitles him to redemption.

REPLEVIN for a motor car alleged to have been held by the defendant as mortgagee under a mortgage made by one Mary Gaboriau and to have been redeemed by the plaintiff as the assignee of such mortgagor. Writ in the Second District Court of Bristol dated March 14, 1916.

On appeal to the Superior Court the case was tried before Morton, J. The evidence is described in the opinion. The judge submitted to the jury three issues, which with the answers of the jury were as follows:

"1. Was the transaction of January 15, 1916, between Mr. Champagne and Mrs. Gaboriau an absolute sale or a mortgage?" The jury answered, "Mortgage."

"2. If it was a mortgage did the defendant, Mr. Champagne, waive the tender of the amount of the repair bill?" The jury answered, "Yes."

"3. What were the damages, if any, to the defendant by reason of the replevin and detention of the automobile?" The jury answered, "None."



Thereupon the judge ordered a verdict for the plaintiff, assessing damages in the sum of \$1; and the defendant alleged exceptions.

R. L. c. 198, § 4, is as follows: "The mortgagor or a person lawfully claiming under him may, after breach of condition, redeem the mortgaged property at any time before it is sold in pursuance of the contract between the parties, or before the right of redemption is foreclosed. The person entitled to redeem shall pay or tender to the mortgagee or to the person claiming under him the amount due on the mortgage, or shall perform or offer performance of the condition, and shall pay all reasonable and lawful charges and expenses incurred in the care and custody of the property or otherwise arising from the mortgage; and if upon such payment or performance, or upon tender thereof, the property is not forthwith restored, the person entitled to redeem may recover it in an action of replevin, or damages for its conversion in any appropriate action."

*A. S. Phillips*, for the defendant.

*D. R. Radosky*, for the plaintiff.

DE COURCY, J. The defendant, Louis Champagne, lent to one Mary Gaboriau the sum of \$300, charging her \$50 therefor, and taking as security a mortgage on an automobile. The mortgage was in the form of an ordinary bill of sale of the machine to Champagne, and a separate agreement from him to sell it back to her, provided that within sixty days she should pay the \$350, and "also pay to whoever shall repair said automobile the cost of said repairs as is now ordered to be done at Marois' repair shop in Fall River." Later Mary Gaboriau, by an informal instrument, assigned all her rights in the automobile and agreement to the plaintiff Israel Pokross. The automobile was in the possession of the defendant as mortgagee. Before the expiration of the sixty days Pokross undertook to tender to the defendant the money due to him, and on March 14, 1916, brought this writ of replevin. The jury specially found that the defendant had waived a tender of the amount of the repair bill; and the judge ordered a verdict for the plaintiff. The defendant excepted to this direction, and to the judge's refusal to direct a verdict in his favor.

On the main issue, that of tender, the jury could find these to

be the facts: Before the expiration of the sixty days the plaintiff produced and offered to the defendant the \$300 loan and \$50 interest, but the defendant refused to take it, and demanded \$50 more, and also payment for a storage battery and platinum points, which he said he had ordered. The repairs referred to in the agreement consisted of painting, which had been ordered by the mortgagor, and for which the agreed price was \$55. Before making the tender of \$350 Pokross went to the shop of Marois for the purpose of paying this bill, but the man who had done the work was out. He went there again after tendering the \$350 (having told the defendant that he was going to do so) but learned that the defendant had anticipated him, and paid the bill. A further tender of the \$350 in cash, and an offer to pay the painting bill, were made by the plaintiff when he went to the defendant's house with the sheriff and the replevin writ.

We disregard this last tender as it was made after the writ was issued. See *Doody v. Collins*, 223 Mass. 332, 334; *Martin v. Bayley*, 1 Allen, 381. The earlier tender was complete as to the \$350. The bill for repairs ordered by the mortgagor, amounting to \$55, was payable by the mortgagor or by the plaintiff, her assignee, to the person who did the work. The plaintiff went to the workshop twice for the purpose of paying it. The defendant, who was under no obligation to pay it, did so with the result, and apparently with the design, of making it impossible for the plaintiff to make the payment. The jury well could find that by thus preventing the plaintiff from paying the bill for painting, and demanding \$50 more than was due, the defendant waived actual payment, and put the plaintiff in the position of a mortgagor who has tendered payment of the mortgage debt. *Schayer v. Commonwealth Loan Co.* 163 Mass. 322.

It seems apparent that the only questions affecting liability on which the parties were at variance in the trial court were (1) whether the transaction between Mrs. Gaboriau and the defendant Champagne was an absolute sale or a mortgage and (2) whether the defendant waived the payment of the repair bill. These issues were submitted to the jury, under instructions to which no exception was taken. When they were answered in favor of the plaintiff, no further question of fact was suggested, or was in dispute. He was "a person lawfully claiming under"

the mortgagor, Mrs. Gaboriau; by tendering performance, he was in the position of one who had performed the condition of the mortgage according to its terms; he became entitled to have the automobile "forthwith restored" to him, and to recover it in an action of replevin. R. L. c. 198, § 4. *Weeks v. Baker*, 152 Mass. 20.

*Exceptions overruled.*

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GRACE E. PETTIT vs. PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Bristol. October 28, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Insurance, Life. Assignment. Equity Jurisdiction, To enforce equitable pledge. Executor and Administrator.*

Where a policy of life insurance names no beneficiary and contains a provision that it shall be void "if the policy be assigned or otherwise parted with," and the insured delivers this policy to a creditor, telling her it is to secure her in case he shall not live to pay what he owes her for board, and such creditor thereafter pays the premiums on the policy until the death of the insured, this gives the creditor no right to maintain an action on the policy.

Where such a policy contains a provision that, "The Company may make any payment provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial or . . . for any other purpose, and" that such payment "shall be conclusive evidence . . . that all claims under this Policy have been fully satisfied," and where the insurer paid the amount due under the policy to the administrator of the estate of the insured, it was *said* that such a payment would be a defence to a suit in equity by a creditor of the insured having an interest as an equitable pledgee of the policy.

It also was *said* that, the promise in the policy above described being made to the insured, with no beneficiary named, the insurer was justified in making the payment to the administrator of his estate.

It also was *said* that, whether the creditor described above had any equitable priority of claim to the insurance money in the hands of the administrator, could not be considered in a proceeding to which the administrator was not a party.

· CONTRACT by a creditor of Joseph McGovern, late of Brockton, holding a claim against his estate to the amount of \$430, on a policy of life insurance to the amount of \$295 upon the life of

Joseph McGovern, who died on November 19, 1915, the policy being alleged to have been assigned by Joseph McGovern to the plaintiff for a valuable consideration. Writ dated November 1, 1916.

In the Superior Court the case was submitted to *White, J.*, upon a "Statement of Agreed Facts," which contained the facts that are stated in the opinion. The statement also stated that it was "further agreed, if material, that the funeral expenses of said insured were paid by a labor organization to which the insured belonged, and that no part of the same was paid by any one else."

The second provision of the policy, referred to in the opinion, was as follows: "The Company may make any payment provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial or, if the Insured be more than fifteen years of age at the date of this Policy, for any other purpose, and the production by the Company of a receipt signed by any or either of said persons or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such Benefits have been paid to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied."

The judge, at the request of the parties, reported the case upon the statement of material facts, as agreed, for determination by this court, without making any decision thereon.

*W. E. Kelley*, for the plaintiff, submitted a brief.

*C. T. Cottrell*, for the defendant.

DE COURCY, J. One Joseph McGovern took out an industrial life insurance policy in the defendant company, dated December 2, 1912. No beneficiary was named. He paid one dollar on account of the weekly premiums of twenty-five cents. Soon after the policy was issued he gave it to the plaintiff, and told her that it was to secure her in case he should not live to pay what he owed her for board. She kept the policy and premium receipt book until McGovern died on November 19, 1915, and paid the premiums thereon, except the one dollar, already mentioned. After his death the plaintiff filed a proof of claim, basing

her right to recover on the fact that she was a creditor of the insured for a sum in excess of the policy. The widow of the insured also claimed the insurance money. Later one Derosier was appointed administrator of the estate of McGovern; and he demanded and received what was due from the defendant.

The trial judge reported the case to this court without making any decision thereon. This action at law is in contract, and the declaration alleges an assignment of the policy to the plaintiff. It does not appear from the agreed facts, however, that there ever was an assignment made; and it is stated affirmatively that before paying the policy the "defendant learned that so far as could be ascertained there was no assignment in writing of this policy." Further, one of the express provisions of the policy is, that it should be void "if the Policy be assigned or otherwise parted with." The payment of the premiums gave the plaintiff no interest in the policy; and there is no privity of contract between her and the defendant. Plainly the plaintiff cannot recover in this action. *Stevens v. Warren*, 101 Mass. 564. *Lewis v. Metropolitan Life Ins. Co.* 178 Mass. 52. *O'Brien v. Continental Casualty Co.* 184 Mass. 584.

Nor can the plaintiff recover from this defendant even if we assume that under the terms of the "Statement of Agreed Facts" we may disregard the pleadings. Accepting her contention that she was a creditor with an equitable interest as a pledgee, nevertheless the defendant was expressly authorized by the second provision of the policy to make payment "to any other person appearing to said Company to be equitably entitled to the same;" and proof of payment to such person was made conclusive evidence that "all claims under this Policy have been fully satisfied."

The promise to pay was made by the defendant to the intestate, and the company was justified in paying the money to the administrator of his estate. *McCarthy v. Metropolitan Life Ins. Co.* 162 Mass. 254. Whether the plaintiff has any priority of claim to the insurance money in his hands cannot be now considered, as he is not a party to these proceedings.

Judgment must be entered for the defendant; and it is

*So ordered.*

PATRICK A. GOLDRICK, administrator, vs. CLARA LACOMBE.

Bristol. October 28, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Motor Vehicle. Husband and Wife.*

Where a married woman, who carries on a teaming business on her separate account, her husband without a salary helping round doing what he can and her son working for her as a teamster, pays for a motor car, bought under a contract of conditional sale made in the name of her husband, but the car is not registered either in her name or that of her husband and afterwards her husband gives a mortgage of the car to secure a business debt owed by her, and where the money paid out for the expenses of the whole family comes from her receipts from the teaming business, if the motor car, when being driven by the woman's son, runs into and kills a pedestrian on a highway, in an action against the woman for causing the death of such pedestrian, in which these facts are shown, it is error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could find that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should be left to the jury.

In the action above described the judge also ruled that there was not sufficient evidence that the defendant controlled the operation of the car immediately before and at the time of the accident, and, in sustaining the plaintiff's exceptions on the ground stated above, it was *said* that, if at a new trial the jury should find that the defendant was not the owner of the car, there was not sufficient evidence of control or of a joint enterprise to require a submission of these issues to the jury.

TORT by the administrator of the estate of Catherine Goldrick, late of Fall River, under St. 1907, c. 375, for causing the death of the plaintiff's intestate without conscious suffering on March 20, 1915, by running into her with a motor car alleged to have been owned by the defendant and driven negligently by the defendant's son, acting as her servant, on Davol Street in Fall River. Writ dated January 31, 1916.

In the Superior Court the case was tried before *Dubruque, J.* The evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident and not suffi-

cient evidence that the defendant controlled the operation of the car immediately before and at the time of the accident. The plaintiff alleged exceptions.

*J. A. Kerns*, for the plaintiff.

*D. R. Radovsky*, for the defendant.

PIERCE, J. The undisputed evidence showed that on March 20, 1915, the plaintiff's intestate was struck by an automobile while crossing a public street, and that an hour later she died without conscious suffering as a consequence of the injuries she then received. "At the conclusion of the evidence the judge ordered a verdict for the defendant, Clara Lacombe, on the ground that there was not sufficient evidence that she owned said automobile at the time of the accident, and not sufficient evidence that the defendant directly controlled the operation of said automobile immediately before and at the time of the accident."

That the husband of the defendant could acquire from a third person a full legal title to the automobile although the only consideration for the transfer moved from the wife, is settled, *O'Brien v. McSherry*, 222 Mass. 147; nevertheless, the jury could find that the husband held only a nominal title in the right of his wife. The facts and circumstances attending the purchase and the use of the automobile are enough to require a submission of the issue of ownership to the jury. They were all admitted by or were inferable from the testimony of the defendant, and are, in substance, that she had been doing a teaming business on her separate account from 1903; that without a salary, her husband helped round doing what he could; that her son Alfred, thirty-nine years old, who was driving the automobile at the time of the accident and had operated it during the previous summer, had worked for her as a teamster since he left school and was able to work; that the proceeds of the business went to her entirely; that "everything that went to the comfort and necessity of the family, as food, clothing, light, heat, pleasure came from the receipts of the teaming business;" that the real estate that was owned at the time of the accident stood in her name; that the only property, the title to which stood in her husband's name, was this automobile, which was bought in 1913 by a conditional sale; that the automobile had not been purchased at her direction; that she let her husband have the money to pay for it because he did

not have any; that she did not remember how many times she had been to the garage with her husband to pay money on account of the automobile; that she was there when he paid \$500; that she let him have that \$500; that she did not remember whether it was cash or a check; that at the request of her husband she went alone to the garage to see the automobile two weeks before it was bought; that she looked at one shown her by the dealer; that she did not look at any other; that the price told her that day was \$1,400; that the car she looked at was purchased at that price subsequently; that at the time of the accident she owed money to one Laplante; that her husband owed Laplante nothing; that Laplante, before the accident, was pressing her for the money; that her husband gave a mortgage of the automobile for security of that money; that she did not know any reason why her husband's automobile should be mortgaged to secure her debt; that she did not give her note, but had done so before. It further appeared that the automobile was not registered in her or in her husband's name.

If the jury should find that the defendant was not the owner, we do not think the evidence of control or of a joint enterprise was sufficient to require a submission of these issues to them.

*Exceptions sustained.*

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### JOHN MELLON'S (dependents') CASE.

Suffolk. October 29, 1918. — November 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

*Workmen's Compensation Act, Legal services of administrator. Attorney at Law. Executor and Administrator.*

A petition under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 13, as amended by St. 1914, c. 708, § 7, by an administrator of the estate of a deceased employee, whose appointment had been insisted on by the insurer in a claim of dependents under the statute, for compensation from the insurer for legal services rendered in connection with his appointment, must be dismissed if the administrator does not show that there was no property of the intestate (apart from the right to compensation under the statute) to be administered and therefore it does not appear that the appointment of the administrator required for carrying out the provisions of the act was "not otherwise necessary."



APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, disapproving the bill of Michael Ruane, Esquire, for professional services rendered in connection with his appointment as administrator of the estate of John Mellon, a deceased employee, alleged to be payable by the insurer under St. 1911, c. 751, Part II, § 13, as amended by St. 1914, c. 708, § 7.

The case was heard by *Jenney, J.* The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, declaring that nothing was due from the insurer to the administrator for the payment of bills rendered or contracted by him in the performance of his duties as administrator and ordering that the petition of the administrator for compensation for professional services be dismissed. The administrator appealed.

The case was submitted on briefs.

*F. W. Mansfield*, for the administrator.

*J. A. Dennison & R. Gallagher*, for the insurer.

PIERCE, J. This is an appeal from the decree of the Industrial Accident Board refusing to allow to the appellant compensation for legal services, alleged to have been rendered in opposing the petition of the insurer to that board to reopen the John Mellon case, because the agreement of compensation "was signed by mistake" and in opposition to a petition of the insurer to vacate a decree of the Superior Court entered upon the filing of the agreement therein. St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14.

The appellant was appointed administrator upon the estate of John Mellon, the employee, deceased. The beneficiaries entitled to compensation lived in Scotland. The insurer agreed to and insisted upon the appointment of an administrator. The record does not disclose the next of kin or whether or not the deceased left estate to be administered. The appellant has been paid for legal services connected with his appointment and for his services as administrator. The questions presented are, whether the appointment of the administrator is shown by the record to have been "not otherwise necessary" and whether,

if it appears to have been "not otherwise necessary," the insurer under Part II, § 13 of St. 1911, c. 751, as amended by St. 1914, c. 708, § 7, is liable for professional services rendered to the administrator in addition to the necessary disbursements and expenses of the administrator with reasonable compensation for his time necessarily spent in carrying out the provisions of this act.

Section 13, amended as above referred to, reads as follows: "The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act. When the appointment of a legal representative of a deceased employee, not otherwise necessary, is required for carrying out the provisions of this act, the association shall furnish or pay for all legal services rendered in connection with the appointment of such legal representative, or in connection with any of his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him for time necessarily spent in carrying out said provisions. All said payments shall be in addition to all sums paid for compensation."

There is nothing in the statements that the insurer would not pay money to the beneficiaries in Scotland, and that the insurer insisted on getting an administrator appointed, inconsistent with the existence of an estate of greater or less value which remained to be administered upon the death of the employee. This is all the record discloses, and manifestly is not sufficient to bring the appointment of the appellant administrator within the terms of the above act. If a legal representative was appointed to administer property left by the deceased employee, the insurer would not be held to reimburse that person for money paid for legal services rendered him in the recovery of the compensation which, under the statute, is to be paid by him to dependents or other persons entitled thereto.

We are of opinion § 13, *supra*, does not place such a burden upon the insurer in case a legal representative otherwise necessary to be appointed is appointed to receive and distribute the compensation in accordance with "the provisions of this act;" and that the duty placed upon the insurer by the terms of the statute is limited to the "necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him for time necessarily spent in carrying out" the provisions of the statute that "If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act."

*Decree affirmed.*

### FRED MARTIN'S (dependent's) CASE.

Suffolk. December 2, 1918. — December 7, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Workmen's Compensation Act, Procedure. Equity Pleading and Practice, Appeal. Superior Court.*

The workmen's compensation act makes no provision for an appeal from a decision of the Industrial Accident Board to this court, giving a right of appeal to this court only from a decree of the Superior Court.

A paper filed in the Superior Court, relating to a decree of that court that was entered upon a claim under the workmen's compensation act, which is entitled "Objections to entry of decree by said Superior Court" and contains reasons for objections to the decree and a "motion for review," is neither in form nor in substance an appeal from the decree.

A memorandum filed by a judge of the Superior Court, referring to the paper described above and stating, "I understood and regarded the respondent . . . as claiming and taking an appeal by this paper," does not make the paper an appeal, the judge having no power to give it this effect.

In the same case the filing of further "Objections to entry of decree by said Superior Court" was *held* to be neither in form nor substance an appeal.

An attempted appeal to this court, not taken according to law, is not before the court and cannot be considered.

ATTEMPTED APPEAL to this court from a decision of the Industrial Accident Board and from a decree of the Superior Court as described in the opinion.

The case was submitted on briefs.

*C. F. Lovejoy*, for the appellant.

*W. B. Keenan*, for the dependent widow.

RUGG, C. J. This was a proceeding before the Industrial Accident Board. It related to fees to be allowed to an attorney for services rendered to the dependent widow of a deceased employee. The attorney presented to the Superior Court copies of pertinent papers on file with the Industrial Accident Board, together with the statement that "he wishes to appeal to the Supreme Judicial Court from the decision of the Industrial Accident Board." That was not an appeal to this court. The workmen's compensation act makes no provision for an appeal from a decision of the Industrial Accident Board to this court, but for an appeal to this court only from a decree of the Superior Court. St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7. *Gould's Case*, 215 Mass. 480.

The matter was heard in the Superior Court and a decree was entered in accordance with the finding of the Industrial Accident Board on February 6, 1918. On the same date the attorney filed in the Superior Court a paper entitled "Objections to entry of decree by said Superior Court." The title appropriately describes the contents of the paper, which set forth several grounds as "reasons for his objections and motion for review." It was denied. This paper was not either in form or substance an appeal from the decree.

On March 2 there was a "Memo." filed by the judge of the Superior Court in these words: "I understood and regarded the respondent Coggan as claiming and taking an appeal by this paper." This statement adds nothing to the force of the paper. The judge of the Superior Court had no power to convert a paper which was in no sense an appeal from the decree into such an appeal. He could not affect the rights of the parties in any such way. *Herrick v. Waitt*, 224 Mass. 415, 417. *Boston Bar Association v. Casey*, 227 Mass. 46, and cases collected at page 51.

No validity was added to the proceedings by the filing by the attorney on March 2, 1918, of further "Objections to entry of decree by said Superior Court." That also was neither in form nor substance an appeal from the decree of the Superior Court.

An appeal not taken according to law is not rightly before us and cannot be considered. *Humphrey's Case*, 226 Mass. 143. *Butland v. Hein*, ante, 242.

*Case dismissed.*

JAMES A. KEOWN vs. MARY E. KEOWN & others.

Essex. October 17, 1918. — December 10, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Equity Pleading and Practice*, Duty of appealing party to print sufficient record, Waiver of bill of exceptions by discontinuance, Plaintiff's right to discontinue suit. Words, "Hearing."

In a suit in equity coming before this court on an appeal by the plaintiff from a final decree dismissing his bill with costs upon demurrer, if the plaintiff as the appealing party does not cause the demurrer to be printed in the record, it will be presumed to have been sufficient in form.

The filing of a discontinuance by the plaintiff in a suit in equity is a waiver of a bill of exceptions previously filed by him.

The right of the plaintiff in a suit in equity to discontinue his suit on payment of costs is extinguished by an interlocutory decree sustaining a demurrer to the bill for want of equity with leave to the plaintiff to amend his bill within thirty days and, if such amended bill is not filed, dismissing the bill with costs, followed by a failure to amend and a final decree dismissing the bill with costs.

BILL IN EQUITY, as amended, filed in the Superior Court on August 10, 1917.

The proceedings are described in the opinion. The final decree dismissing the bill with costs, the material part of which is quoted in the opinion, was entered by order of *Jenney, J.* The plaintiff appealed.

*J. A. Keown, pro se.*

*F. J. Muldoon, J. F. Sullivan & J. H. Casey*, for the defendants, filed no brief and did not care to be heard.

RUGG, C. J. A final decree was entered in the Superior Court to the effect that the "case came on to be heard . . . upon the discontinuance heretofore filed by the plaintiff, and thereupon, upon consideration thereof, and after hearing all parties, it is ordered, adjudged and decreed: (1) That the bill be and it hereby

is dismissed as to the defendants Mary E. Keown and Eugene F. Trudo," and (2) for costs as stated. The plaintiff appealed from that decree and now contends that he is entitled as matter of law to have it stated in the decree that it is dismissed for want of prosecution or without prejudice, or in some form which shall indicate that the decree was not entered upon the merits and thus would not be a bar to the bringing of another suit for the same cause of action. Whether there is any merit in that contention depends upon the state of the record.

The plaintiff's amended bill was filed on August 10, 1917. A paper entitled "Defendants' Answer" was filed on the same date. That paper was in no sense a proper answer in equity because it was merely a general denial in form such as would have been appropriate in an action at law. In no particular did it conform to Equity Rule 7 of the Superior Court, which requires an answer to be full, direct and specific respecting every material allegation or statement in the bill. According to equity practice it should have been treated as no answer at all. No replication appears ever to have been filed. See now St. 1918, c. 257, § 405. On September 5, 1917, the present defendants filed a demurrer. That demurrer is printed in the record. It goes to the merits of the plaintiff's grounds for equitable relief. It does not bear the certificate of the attorney required by R. L. c. 173, § 16. No objection appears of record to have been taken to the form of the demurrer, and none has been argued by the plaintiff in this court. It is open to grave doubt whether such an objection could be relied upon by the plaintiff at this stage of the proceedings. However that may be, other parts of the record are decisive. A second demurrer was filed by these defendants on September 20, 1917. But it is not printed in the record. It must be presumed against the appealing party, whose duty it was to print a sufficient record to present the points upon which he relies, that the second demurrer was sufficient in form and was the one upon which the court took action. The original papers in the case confirm this presumption. While no demurrer can be filed as matter of right after answer, yet by Equity Rule 9 it may be filed by leave of court. It must be taken that leave to file this demurrer was granted by the court, if any leave was needed, because a hearing was had. On

September 27, 1917, a docket entry was made of this tenor: "Demurrer sustained, leave granted to plaintiff to file amended bill in thirty days. If such amended bill is not filed, decree is to be entered dismissing bill with costs." No amended bill has been filed at any time since. On September 29, 1917, there is a docket entry "Plaintiff appeals." One or two appeals by the plaintiff from interlocutory orders appear on the docket, but none of these appeals have been printed or argued. Under date of December 3, 1917, appears this docket entry: "Supplemental bill of complaint." No such paper is printed in the record. In any event it could not have been in compliance with the order of the court of September 27, 1917. It does not appear that it was filed or that leave of court therefor ever was granted. It should be disregarded.

There is on October 13, 1917, this docket entry: "Bill of exceptions of plaintiff." This bill of exceptions is not printed and there is nothing to indicate to what it relates or whether it refers to these defendants. It does not appear to have been allowed. It has not been argued. No excuse is disclosed for delay in presenting it for allowance. It was subject to the terms of St. 1911, c. 212, which applies to proceedings in equity. See *McCusker v. Geiger*, 195 Mass. 46. It should have been dismissed, because manifestly before the entry of the final decree more than a reasonable time had elapsed for presentation to the court for allowance. No determination is necessary whether under these circumstances the entry of the final decree eight months later, in the absence of anything further, must be held to import a decision that the exceptions had not been presented to the court for allowance within a reasonable time. The filing of a discontinuance of the action by the plaintiff was a waiver of these exceptions and all intervening appeals. They constitute now no bar to the final disposition of the cause. *Frank, petitioner*, 213 Mass. 194.

The plaintiff filed on June 12, 1918, a statement that he discontinued the action. On July 10 following the final decree above quoted was entered.

The only point argued and the point to be decided is whether a plaintiff as of course can have his bill dismissed without prejudice after a demurrer to it has been sustained.

It is the general rule in equity that a plaintiff has a right "to dismiss his bill at any time before a hearing, upon the payment of the costs." *Kempton v. Burgess*, 136 Mass. 192. *Lakin v. Lawrence*, 195 Mass. 27. *Weston v. Railroad Commission*, 205 Mass. 94, 97. *Lloyd v. Imperial Machine Stamping & Welding Co.* 224 Mass. 574. The plaintiff does not bring himself within this comprehensive statement of the rule, because there has been a hearing upon the demurrer. "Hearing" is a word sufficiently broad in meaning to include a judicial examination of the issue between parties, whether of law or fact. *McArthur Brothers Co. v. Commonwealth*, 197 Mass. 137, 140. But this general statement of the rule was given an amplified exposition in *Hollingsworth & Vose Co. v. Foxborough Water Supply District*, 171 Mass. 450, at page 452, in these words by Knowlton, J.: "The general rule seems to be that the court, on the plaintiff's motion, will dismiss his bill on payment of costs as for want of prosecution, unless something has been done in the case which entitles the defendant, on equitable grounds, to have the suit finally disposed of on the merits. If there have been decrees or other proceedings whereby a defendant's situation has been changed, and he has acquired rights which did not exist, or which had not been determined when the suit was brought, and which render it equitable that these rights should be fully secured by further proceedings in the cause, the court, at the defendant's request, will retain it for a decision upon the merits; but when nothing has been done by the court or the parties that changes the position in which they were when the suit was begun, the rule is different."

The present case plainly comes within the law as thus stated. The defendants challenged by a demurrer the right of the plaintiff to maintain his bill. A hearing has been had upon that demurrer and a decision has been rendered in favor of the defendants. The parties are no longer indifferent touching the matters alleged in the bill. The situation of the defendants has changed since the suit was instituted, because a decision has been rendered to the effect in substance that the plaintiff in his bill as framed could not prevail or require the defendants to answer. The defendants are entitled to a decree because a hearing has been had upon questions of law raised by the demurrer respecting



the sufficiency of the bill as stating a ground for equitable relief and the decision has been made in their favor. It is of no consequence that the hearing related to law rather than to facts. It is well established that under appropriate circumstances a judgment rendered on demurrer is as conclusive as one rendered upon the hearing of evidence. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 205. *Northern Pacific Railway v. Slight*, 205 U. S. 122, 130. *Yates v. Utica Bank*, 206 U. S. 181, 183. Therefore, that decision stood and ought to continue to stand as an adjudication of the rights of the parties in the particulars there involved. The case falls directly within what is sometimes called, "a distinct and well settled exception" to the general rule that a complainant "has the right at any time, upon payments of costs, to dismiss his bill . . . namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant." *Chicago & Alton Railroad v. Union Rolling Mill Co.* 109 U. S. 702, 713. *Pullman's Palace Car Co. v. Central Transportation Co.* 171 U. S. 138, 146. See also *Detroit v. Detroit City Railway*, 55 Fed. Rep. 569, for a review of cases by Taft, Circuit Judge.

Moreover, the plaintiff was given leave to amend his bill within thirty days after the order sustaining the demurrer, and did not avail himself of that privilege. Even in actions at law where a party is given leave to amend in order to cure defects, and declines to do so, the judgment rendered on demurrer commonly is treated as based on the merits. *Correia v. Supreme Lodge Portuguese Fraternity*, 218 Mass. 305. *Capaccio v. Merrill*, 222 Mass. 308, 310. See, in this connection, *Lumiansky v. Tessier*, 213 Mass. 182, 190, and *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 475.

It has been held that a plaintiff cannot as of course have his bill dismissed after a general demurrer has been overruled and the accruing of a right of appeal by the defendant, because the latter might prevail and thus secure an adjudication upon the merits of the cause. *Cooper v. Lewis*, 2 Phil. Ch. 178, 181. See *Ainslie v. Sims*, 17 Beav. 174, and *Dan. Ch. Pract.* (6th Am. ed.) 790.

The case at bar presents a far stronger case than that in favor of the defendants.

It follows that the plaintiff was not entitled as of right to discontinue his bill. No error appears upon the record.

*Decree affirmed with costs.*

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ELMER N. KEITH *vs.* RAPHAEL ROSNOSKY (after discontinuance against another defendant).

Suffolk. October 14, 1918. — December 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Supersedeas. Bond, Approval. Evidence, Presumptions and burden of proof. Trespass, On real estate. Landlord and Tenant. Constable.*

A writ of supersedeas, commanding the officer in whose hands an execution has been placed for service to refrain from further action thereon, takes effect from the time that the sheriff or constable in whose hands the execution has been placed for service has notice of such writ.

Where the docket entries of a court from which a writ of supersedeas purports to have issued state that a bond in a certain sum was filed, "surety app'd by Clerk," and that "Ct. orders Supersedeas to issue & same is issued," and the bond bears an indorsement made on the date of these entries, "Examined and approved," signed by the clerk of the court, it sufficiently appears that all these things were done by or by direction of the court and it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue.

An action of tort will not lie against a constable who, in serving an execution commanding him to put the owner in possession of certain premises occupied by the plaintiff and his family, removed the furniture, thus making it necessary for the plaintiff's wife and child to leave, and who in doing so "shut his fist and hollered and hollered" but did not come within striking distance of the plaintiff's wife and child.

TORT, brought originally against Jacob Perlis, the plaintiff's former landlord, and Raphael Rosnosky, a constable, but discontinued against the defendant Perlis. At the trial the plaintiff elected to rely only on the second and fourth counts of his declaration, which are printed below. Writ dated April 2, 1915.

The counts relied upon were as follows:

"Count 2. And the plaintiff says that on or about the twenty-sixth day of March, A.D. 1915, the defendant Rosnosky, under instructions from the defendant Jacob Perlis, did with force and arms make an assault on the plaintiff, and then and there seized and laid hold of the plaintiff and then and there forced and obliged the plaintiff to go in and along divers public streets to a certain office, and then and there imprisoned the plaintiff and kept and detained him without any reasonable and proper cause whatever for a long time, contrary to law and against the will of the plaintiff, whereby the plaintiff was greatly hurt, bruised, wounded and greatly exposed and injured in his reputation, credit and business, and was put to great expense for counsel fees and loss of time by reason of the defendant's acts.

"Wherefore the plaintiff claims damages as alleged in his writ."

"Count 4. And the plaintiff says that the defendant Rosnosky is a constable in the city of Boston, and that on or about January 27, 1915, the defendant Perlis gave him an execution against the plaintiff for possession of the premises numbered 1873 Columbus Avenue, Roxbury, Mass., and the costs to the amount of Six 84/100 Dollars; that the defendant Rosnosky with others thereafter went to the plaintiff's premises at 1873 Columbus Avenue for the purpose of ejecting the plaintiff from the premises; that when the said Rosnosky arrived at said premises he was informed by the plaintiff's wife and a physician, who was in attendance on one of the plaintiff's children, that one of the plaintiff's children, who was then in bed, was seriously ill, and that the child could not be moved at that time; that despite this notice, the defendant Rosnosky removed the plaintiff's furniture and effects from the premises and put them on the street, and later in a storehouse, excepting a couch-bed, upon which the said sick child was lying; that the defendant Rosnosky then left the premises; that the plaintiff's child's sickness was greatly aggravated by reason of the acts of the defendants in removing from the premises all the clothing and household effects necessary for the child's recovery, and from the disturbance created by the defendant Rosnosky and his agents in pulling down the furniture and removing it, the said child became very ill, requiring the constant attendance of a physician during its illness, and that those

acts of the defendants toward the plaintiff's child also affected the health of the plaintiff's wife, and she became ill therefrom; that by reason thereof the plaintiff was put to great expense for medical attendance and medicine for both his wife and child.

"Wherefore the plaintiff claims damages as alleged in his writ."

In the Superior Court the case was tried before *Hitchcock*, J. The evidence for the plaintiff is described in the opinion. At the close of the plaintiff's evidence the defendant made a motion asking the judge to order a verdict for him. The judge submitted to the jury two questions, which with the answers of the the jury were as follows:

"1. Did the defendant Rosnosky know before he had made the arrest on the execution that a writ of supersedeas had been issued, commanding him to refrain from further action on the execution?" The jury answered, "Yes."

"2. If the plaintiff was unlawfully arrested by the defendant Rosnosky, what damages did he suffer?" The jury answered, "\$250."

Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*E. Carr*, for the plaintiff.

*D. H. Fulton*, (*C. Rosnosky* with him,) for the defendant.

PIERCE, J. This is an action of tort. The declaration was in four counts. Only the second and fourth were relied upon. The second count alleged an assault and battery and false imprisonment on March 26, 1915. The fourth count, informally stated, apparently was intended to charge a trespass *quare clausum fregit* by the defendant, a constable, who had entered the premises by authority of an execution against the plaintiff for possession on January 27, 1915, and had removed the plaintiff's furniture and effects, as alleged, with such disturbance as to aggravate the sickness of the plaintiff's child, then in bed; as also, by reason of the acts of the defendant toward the plaintiff's child, so to affect the health of the plaintiff's wife as to cause her to become ill therefrom; whereby "the plaintiff was put to great expense for medical attendance and medicine for both his wife and child." At the close of all the evidence the presiding judge "rule[d] as a matter of law, that upon all the evidence in the case the plaintiff is not entitled to recover," and directed

the jury to return a general verdict for the defendant, which they did. The case is before us on the plaintiff's exceptions.

Upon the count for assault and false imprisonment the plaintiff proved the arrest was on an execution for costs by the defendant in his capacity as a constable of the city of Boston. To avoid the justification the plaintiff proved that a writ of supersedeas had been issued commanding the defendant to refrain from further action on the execution; that the defendant knew the supersedeas had issued, and offered evidence tending to prove that the defendant had received the writ of supersedeas. No evidence was offered to prove an official service of the writ on the defendant. The writ of supersedeas is not addressed to a sheriff or other officer, to be served on him who holds the process, the action of which is to be suspended, but it is directed to the officer who holds the execution, informing him that the execution or other mandate has been superseded, *Welch v. Jones*, 11 Ala. 660; and like an injunction may be served by any one. *In re Lennon*, 166 U. S. 548, 554. We think it takes effect from the time the sheriff or constable who holds the process has actual notice of it. *Hopkinson v. Sears*, 14 Vt. 494. *Morrison v. Wright*, 7 Port. 67. *Frohlichstein v. Jordan*, 138 Ala. 310, 316. *State v. Dwyer*, 12 Vroom, 93. See *Tarleton v. Fisher*, 2 Doug. 671, cited in *Wilmarth v. Burt*, 7 Met. 257, 259.

The defendant contends that "the alleged supersedeas, as a matter of law, did not properly issue and did not render the plaintiff immune from arrest" because the bond required to be given by R. L. c. 193, §§ 17 and 18 to the adverse party, with security approved by the court, was not approved by the court but was approved by the clerk, as appears by the docket of the court. The docket entries are as follows:

"Feb. 11 Petr. files bond in sum of \$100. Mark A. Collins surety app'd by Clerk.

"11 Ct. orders Supersedeas to issue & same is issued."

The bond on the same date as the above entries was indorsed:

"Examined and approved:

Edward W. Brewer, Clerk."

The order of docket entries and the indorsement on the bond indicate that they were all made by the direction of the court, and it must be presumed that the court, having knowledge of

the requirement of the statute, approved the bond and the security of the bond before ordering the supersedeas to issue. *Parke v. Mabee*, 176 Mass. 236. It follows that a verdict for the defendant on the second count should not have been directed.

Upon the count for trespass *quare clausum fregit* the defendant justified under an execution for possession. The plaintiff introduced no evidence of assault or of physical violence imposed on himself or upon his child. His wife testified that the defendant "was going back and forth. I ran up against the closet door, thinking that he was going to hit me, as he shut his fist, and hollered and hollered." She testified "No," in answer to the questions "He didn't strike you?" "He didn't come within striking distance?" It is clear the wife and child had no cause of action against the defendant because of noise and disturbance in the removal of the furniture and effects, or because of any act of violence or threat of physical harm. Whatever the defendant did or said cannot fairly be said to have denoted at the time to the wife an intention to attack her. "The defendant's duty was to put the true owner in possession in obedience to the command of the execution." To put the owner into possession required of necessity the removal not only of the plaintiff, but also of his family and effects. *Fiske v. Chamberlin*, 103 Mass. 495. Upon all the evidence we do not think the defendant was guilty of any substantial abuse of his authority. *Six Carpenters Case*, 8 Rep. 146 b.

The entry as to the ruling on the second count must be, exceptions sustained; and as to the fourth count, exceptions overruled; and it is

*So ordered.*

WILLIAM D. TURNER & another vs. FIRST CONGREGATIONAL  
SOCIETY OF NORTH BROOKFIELD.

Suffolk. October 16, 1918. — December 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

*Devise and Legacy. Trust, Appointment of trustees.*

A codicil to the will of a testator contained the following provisions: "Wishing that my old home . . . situated on Main Street in the town of North Brookfield may be used for some charitable purpose. Therefore my trustees will, upon the decease of both my wife A G P, and my daughter E J B, convey and transfer the said premises in trust to the First Congregational Church of the aforesaid town and I hereby request the said church to appoint an agent or committee to have the care and custody of the said property, keep the same insured and in good repair at all times and provide the necessary coal and wood to those persons occupying the same. The said premises to be occupied rent free by such needy and elderly protestant women as the said committee may approve, not to exceed four at any time. And furthermore I give and bequeath to the aforesaid Church the sum of five thousand dollars in trust the same to be safely invested in the name of the said church and the net income thereof to be expended in the payment of the necessary charges in carrying on the above work, . . ." The residue of the testator's estate was given, one half to a religious mission society, and the other half one third to his wife, one third to his daughter and the remaining one third to his four grandchildren. The will and codicil showed an intention to vest the title in the homestead property above described in the trustees under the will but contained no express provision in regard to the beneficial use of the homestead property during the lives of the testator's wife and daughter and the right to such use *pur autre vie* accordingly vested in the residuary devisees. Upon a petition, filed after the death of the testator's widow and while his daughter was living, for the appointment of the trustees, already appointed under the other trusts of the will, also as trustees to hold and maintain the homestead property above described during the life of the testator's daughter and upon her death to convey it as above directed, it was *held* that the legal title in the homestead property during the life of the testator's daughter did not vest in the residuary devisees, and that the court had authority to appoint the trustees for the purposes set forth in the petition.

APPEAL from a decree of the Probate Court for the county of Suffolk appointing William D. Turner and William W. Towle trustees under the will of Whipple N. Potter, late of Boston, and the codicil thereto, to hold certain real estate in North Brookfield described in the opinion for the purposes there named.

The case was heard by *Pierce, J.*, who made a memorandum

of decision, containing the facts which are stated in the opinion. The respondent asked the single justice to rule that, "Under the terms of the will and codicil of Whipple N. Potter, there is no authority to appoint trustees as prayed for in the petition." The justice refused to make this ruling and ordered that a decree be entered affirming the decree appealed from and remitting the case to the Probate Court. Later by order of the single justice a final decree was entered in accordance with this decision; and the respondent appealed.

*R. B. Dodge*, for the respondent.

*H. S. Davis*, for the petitioners.

DE COURCY, J. This is a petition, filed in the Probate Court, praying for the appointment of trustees of certain real estate in North Brookfield which belonged to Whipple N. Potter, the testator, at the time of his death. The Probate Court made a decree appointing the petitioners trustees; and on appeal a single justice of this court affirmed the decree. The respondent appealed from this decision, contending that "under the terms of the will and codicil of Whipple N. Potter, there is no authority to appoint trustees as prayed for in the petition."

The real estate in question was the former home of the testator. It has an appraised value of \$1,800 and consists of one quarter acre of land with a dwelling house thereon. The will, in article 5, established a trust fund of \$50,000, which, after the death of the testator's wife and daughter, was to be held by a corporation to be known as the "Whipple N. Potter Home" for the care of aged protestant people of the town. The article then proceeded: "I suggest that the sum of ten thousand dollars thereof be used for the purposes of a building which it is my wish shall be erected on my real estate on Main Street, in North Brookfield known as the 'Potter Place' and that the remainder of what may then constitute this fund be set apart and the income thereof used for the general purposes of the home."

The codicil revoked said article 5, and contained the following provision material to the present case:

"Article 2nd. Wishing that my old home the Whipple N. Potter Home (so called) situated on Main Street in the Town of North Brookfield may be used for some charitable purpose. Therefore my trustees will, upon the decease of both my wife



Angeline G. Potter, and my daughter Emma J. Brownson, convey and transfer the said premises in trust to the First Congregational Church of the aforesaid town and I hereby request the said church to appoint an agent or committee to have the care and custody of the said property, keep the same insured and in good repair at all times and provide the necessary coal and wood to those persons occupying the same.

"The said premises to be occupied rent free by such needy and elderly protestant women as the said committee may approve, not to exceed four at any time.

"And furthermore I give and bequeath to the aforesaid Church the sum of five thousand dollars in trust the same to be safely invested in the name of the said church and the net income thereof to be expended in the payment of the necessary charges in carrying on the above work, and should any unforeseen circumstances arise in which the said income should be insufficient I hereby authorize the trustees aforesaid to pay such sum of money as may be necessary to make up the deficit not to exceed one hundred dollars in any one year."

By the fifteenth article of the codicil the residue of the estate was given, one half to the Massachusetts Home Mission Society, one sixth to the testator's wife, one sixth to his daughter and one sixth to his four grandchildren. The testator died in 1908. Angeline G. Potter and Charlie A. Jones, named in the codicil as sole executors and trustees, were appointed executors but both died soon after. The daughter, Emma J. Brownson, is still living. In 1910 the present petitioners were appointed administrators *de bonis non* with the will annexed; and on a bill for instructions filed by them it was decreed, among other things, that the fund of \$5,000 provided for in article 2 of the codicil is not to be paid over until the death of Emma J. Brownson. No trustees have ever been appointed to succeed those named in the will and codicil; except that in 1910 four separate petitions were filed in the Probate Court for the appointment of William D. Turner and Arthur Perry as trustees of the property given in trust for the use and benefit respectively "of Angeline G. Potter and others, under the fourth clause of the said will," "of Angeline G. Potter and others under the fifth clause of said will," "of Emma J. Brownson and others, under the sixth clause of

said will" and "of Benjamin F. Spillman and others under article fourth of the codicil to said will." Each of these petitions was allowed by a decree following the language of the petition.

The tenor of the will and codicil indicate clearly that the testator intended to set apart his old homestead as a home for aged people. He excepted it from the general power of sale which he gave to his executors in article 27 of his will; and apparently assumed that it constituted a part of the property held in trust under article 5. In article 2 of the codicil the dedication of the homestead to this charitable purpose is explicit; but the testator omitted, intentionally or otherwise, to make a specific disposition of the beneficial interest during the lives of his wife and daughter. The effect of the codicil is to vest in the residuary devisees the equitable estate *pur autre vie* during the lives of Mrs. Potter and Mrs. Brownson. But the testator has not manifested an intention that the residuary devisees, — four of whom were minors, holding only small fractional interests, — as tenants in common should have the legal title of and responsibility for this unproductive property during the life tenancy. On the contrary he expressly provided that the conveyance of the homestead to this respondent should be made by his "trustees." And in article 18 of the codicil he named Angeline G. Potter and Charlie A. Jones as "sole Executors and Trustees of both my said will and this codicil thereto." In our opinion the intention of the testator, as manifested in his will and codicil, was to have the homestead property held by trustees during the life tenancy as well as afterwards. *Quigley v. Gridley*, 132 Mass. 35. *Robinson v. Cogswell*, 192 Mass. 79.

After the death of the persons named in the will as trustees, William D. Turner and Arthur Perry were appointed. If the appointment had been a general one as trustees under the will and codicil, the legal title to the homestead would have vested in them, with the express power to convey as "my trustees." But as, for some reason not apparent, their appointments were restricted to certain specified funds, (*Carruth v. Carruth*, 148 Mass. 431,) there is a vacancy in the office of trustees of the homestead property. No question is before us as to the necessity of appointing trustees at this time to protect the property so long as Mrs. Brownson lives; and the suitability of the peti-

tioners is unchallenged. We are of opinion that the single justice rightly decided that the court had authority to appoint trustees as prayed for in the petition.

*Decree affirmed.*

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BERNARD D. WINER vs. SAMUEL ROSEN.

Suffolk. October 17, 1918. — December 11, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Mechanic's Lien.*

Upon a petition to establish a mechanic's lien for work and materials under R. L. c. 197, it appeared that the work and materials were furnished under a contract in writing "for the construction of a First-class Low Pressure Steam Heating Apparatus," in which it was declared that the specifications were "intended to cover everything necessary to make a first class warming apparatus," that after the work was supposed to have been completed and the heating plant had been in use for more than a month the petitioner and the respondent each received a notice in writing from the State boiler inspector that a certificate of inspection, without which the boiler could not be operated lawfully, would be withheld until certain specified changes were made in the safety valve and the steam gauge, that immediately on receiving the notice the petitioner went to the premises with the inspector, who showed him what work was required, and that within two days from the time of receiving the notice the petitioner had completed the changes in compliance with the notice. The petitioner's statement of lien was filed in the registry of deeds within thirty days after the completion of such changes. There was nothing to show that the work upon these changes was not done in good faith or that it was done for the purpose of reviving a lien. *Held*, that the work upon the changes was required for the completion of the petitioner's contract, and that he was entitled to have his lien established.

PETITION, filed on February 16, 1916, under R. L. c. 197, to enforce a mechanic's lien for labor and materials furnished under a contract in writing described in the opinion.

The respondent's amended answer contained an allegation that the petitioner did not comply with the provisions of R. L. c. 197, § 6, "in that he did not file his claim for a lien until more than thirty days after the completion of his work had passed."

In the Superior Court the case was heard by Dana, J., without a jury. The evidence is described in the opinion. At the

close of the evidence the petitioner asked the judge to make eight rulings, one of which was made by the judge and three of which were waived by the petitioner. The others were as follows:

"1. That upon all the evidence the petitioner is entitled to establish his lien."

"5. The evidence being to the effect that the owner of the premises made the contract for the furnishing of the labor and materials for the steam heating plant and that part of the materials and labor was furnished as late as November 27, 1915, December, 1915, and January 8 and 10, 1916, and that the petitioner claimed a lien on January 13, 1916, and duly recorded the same in the registry of deeds, that he filed his petition to enforce said lien on February 16, 1916, then the petitioner has brought himself within the R. L. c. 197, § 6, and is entitled to establish his lien."

"7. R. L. c. 197, § 6, requires that the petitioner should file a claim of lien in the registry of deeds within thirty days after he has ceased to labor or to furnish materials for the building or structure and nothing else, and the evidence having shown that the petitioner ceased to furnish labor and materials on January 10, 1916, that he duly filed a claim of lien in the registry of deeds on January 13, 1916, and that the petition to enforce his lien was filed on February 16, 1916, then the petitioner has brought himself within the provisions of R. L. c. 197, § 6, and is entitled to establish his lien."

"8. That the last work having been done as late as January 10, 1916, and the certificate claiming a lien having been filed on January 13, 1916, then said certificate was seasonably filed and the action was seasonably brought."

The judge refused to make any of these rulings and made the finding which is quoted in the opinion.

The judge also found that the only work that was done within thirty days before January 13, 1916, on which date the statement of lien was filed in the registry of deeds, was putting a steam gauge and safety valve on the boiler on January 10, 1916, "in accordance with the notice of the State boiler inspector, and with a view to make the work conform with the terms of contract." The judge refused to rule that this legally

entitled the petitioner to maintain his lien necessarily as a matter of law.

The judge found that there was due and owing to the petitioner from the respondent the sum of \$728.14. He found that the petitioner had not established his lien and found for the respondent. The petitioner alleged exceptions. It was agreed between the parties, that, if this court should be of the opinion that the petitioner was entitled to establish his lien, an entry was to be made, "Petitioner's lien established in the sum of \$695.90 with interest from the date that the lien was claimed;" otherwise, an entry was to be made, "Petition dismissed, without prejudice to the right of the petitioner to recover the amount due to him."

*M. H. Steuer*, for the petitioner.

No counsel appeared for the respondent.

CROSBY, J. This is a petition to enforce a mechanic's lien. The case was heard by a judge of the Superior Court, sitting without a jury, who refused to make certain rulings requested by the petitioner and found for the respondent.

The labor and materials were furnished under a written contract between the parties, by which the petitioner agreed to construct and install a low pressure steam heating apparatus in a building owned by the respondent for the sum of \$1,250. After the work had been substantially completed and was in use, the petitioner and the respondent each received a written notice directed to the petitioner from the State boiler inspector, which recited that a certificate of inspection would be withheld until orders for certain changes in the work were complied with; and that it would be unlawful to operate the boiler without such certificate. The changes referred to in the notice were as follows:

- "1. Remove the safety valve from its present connection and have it placed on a separate connection to boiler of the full size of the valve.

- "2. Replace the present steam gauge with one graduated to at least thirty pounds pressure."

The notice was dated and received by the petitioner on January 8, 1916. On that day, which was Saturday, he went to the premises with the inspector, who showed him what work

was required before the boiler could be operated lawfully, and on Monday, January 10, 1916, the petitioner made the changes in compliance with the notice.

The case is before this court upon the petitioner's exceptions to the refusal of the judge to make certain rulings which in substance were that the petitioner was entitled to establish a lien.

The judge found as a fact "that the contract was completed to all intents and purposes in the late fall of 1915, and that the heating plant was in use at such time, although without the steam gauge or safety valve referred to above in the notice of the State boiler inspector, and although such use had been in violation of the State laws." It is a reasonable inference from this finding, and from the refusal of the judge to make the rulings requested, that he was of opinion that the work done on January 10, 1916, was not in performance of the contract. He did not find that it was not done in good faith, and there is nothing to show that the petitioner did it for the purpose of reviving a lien. The record shows that immediately after being notified by the inspector that the work was not done in compliance with the laws of the Commonwealth, the petitioner made the changes required. There is nothing to show that in doing this work he did not act in good faith and with a desire to comply with the terms of the notice. If the last work so performed was required by the contract, the petitioner is entitled to a lien; otherwise, the lien is lost.

The contract provides that the specifications are "for the construction of a First-class Low Pressure Steam Heating Apparatus . . .," and that "all materials to be used in the work to be of the best of their respective kinds, and the workmanship to be first class in every particular . . ." It is further provided that "All workmanship and materials used in the construction of this apparatus are to be the best of their respective kinds, and the apparatus is to be capable of warming all the rooms. . . . Finally. This specification is intended to cover everything necessary to make a first class warming apparatus."

It is apparent from the portions of the contract above quoted that a heating apparatus which could not be lawfully used was not what the contract called for. It is equally clear that it was the duty of the petitioner to make the required changes and

remedy the defects which had been called to his attention by the boiler inspector.

We are of opinion that the work done on January 10 was, for the reasons stated, within the terms of the contract, and that the rulings requested by the petitioner in substance should have been given. There was no time limit fixed for the completion of the contract, and the work done on January 10 does not stand differently than where any other defective work is afterwards remedied so as to conform to the contract. "The statute is remedial and intended to protect those who lawfully enhance the value of land by the expenditure upon it of material or labor." *Shaughnessy v. Isenberg*, 213 Mass. 159, 162. *Thurston v. Blunt*, 216 Mass. 264.

In accordance with the stipulation of the parties, the following entry is to be made:

*Petitioner's lien established in the sum of \$695.90 with interest from the date that the lien was claimed.*



JOSEPH S. WATERMAN AND SONS, INCORPORATED, vs. JOSEPH H. SOLIDAY, administrator *de bonis non*.

Suffolk. October 15, 1918. — December 12, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Practice, Civil, Rulings and instructions. Limitations, Statute of, Special. Executor and Administrator, De bonis non.*

Where a judge hearing a case without a jury refuses to pass on certain requests for rulings, this is equivalent to a refusal to make the rulings requested.

Under R. L. c. 141, § 17, (now amended by St. 1914, c. 699, § 7,) the liability of an administrator *de bonis non* in an action of contract is limited to two years after he gave notice of his appointment unless new assets have come to his hands, and where he is made a party to a pending action originally brought against a former administrator of the same estate, the action cannot be maintained unless the administrator *de bonis non* has been brought into court as a party within such two years.

CONTRACT, originally brought against Orlando F. DeShon, administrator of the estate of Charles Henry Fowler, late of Boston.

Writ in the Municipal Court of the City of Boston dated September 16, 1911, and amended by leave of that court on November 18, 1916, by the substitution as defendant of Joseph H. Soliday, administrator *de bonis non* of the estate of Charles Henry Fowler.

On appeal to the Superior Court the case was submitted upon an agreed statement of facts to *Sisk, J.*, sitting without a jury. The material facts are stated in the opinion. The judge ruled that R. L. c. 141, § 17, operated as a bar to the plaintiff's action. He denied a motion of the plaintiff asking him "to direct a finding for the plaintiff," and ruled at the request of the defendant "that on the agreed statement of facts the finding must be for the defendant." The plaintiff filed a request for certain rulings. The judge filed a "memorandum" in which he stated his rulings as given above and in regard to the plaintiff's requests made the following statement: "The plaintiff filed nine requests for rulings, a copy of the same being annexed hereto. As all the facts are agreed, and in view of my finding for the defendant upon those facts, and my ruling that the statute is a bar to the action, the plaintiff's requests for rulings inconsistent therewith become immaterial and inapplicable."

The judge found for the defendant; and the plaintiff alleged exceptions.

*S. R. Wrightington*, for the plaintiff.

*H. T. Richardson*, for the defendant.

CROSBY, J. This action was heard by a judge of the Superior Court, sitting without a jury, who ruled that it could not be maintained, and found for the defendant. The plaintiff excepted to certain rulings and refusals to rule, and also to the refusal of the judge to pass specifically upon certain requests for rulings. The failure of the presiding judge to rule upon the requests last above referred to is equivalent to a refusal to make such rulings, and is to be so treated. The case is before us upon the plaintiff's exceptions, an agreed statement of facts, and a "memorandum" filed by the judge.

On September 21, 1909, Orlando F. DeShon was appointed administrator of the estate of Charles Henry Fowler and duly qualified as such administrator. The plaintiff had a claim against the estate for the funeral expenses, and on September 16, 1911,



brought an action against the administrator in the Municipal Court of the City of Boston. The defendant was defaulted but judgment was not entered. On January 11, 1912, the plaintiff caused the administrator to be cited into the Probate Court to render an account, and afterwards he was removed by that court. On January 18, 1912, the defendant was appointed administrator *de bonis non* of the estate, and he duly qualified as such administrator by giving a bond, which was approved on the same date; he also seasonably gave due notice of his appointment. On February 12, 1914, his first account was allowed, and on the same day, under and in accordance with an order for distribution made by the Probate Court, he fully distributed the estate to the heirs at law. On October 8, 1914, a final decree was entered in the Probate Court confirming the distribution. The plaintiff had no actual notice or knowledge of the defendant's appointment as administrator, of the filing or allowance of his account, of the order of distribution, of the actual distribution, or of any other proceeding affecting the estate, until about November 18, 1916. The defendant had no actual notice or knowledge of this action, or of the claim of the plaintiff against the estate, until about November 18, 1916. No further assets are in the hands of the administrator, and it is also agreed, if material, that neither of the parties was negligent in the premises.

On November 18, 1916, the plaintiff filed a motion in the Municipal Court to amend the writ and declaration by substituting the name of the defendant as administrator *de bonis non* for the name Orlando F. DeShon, administrator, which motion was allowed, and thereafter the defendant was summoned in to defend the action. He appeared and filed an answer setting up among other defences the special statute of limitations. R. L. c. 141, § 17. The allowance of the amendment was within the discretion of the Municipal Court, and we do not understand the defendant to contend to the contrary. R. L. c. 173, §§ 48, 121. *Hutchinson v. Tucker*, 124 Mass. 240.

R. L. c. 141, § 17, (now amended by St. 1914, c. 699, § 7,) is applicable to the case at bar. It provides that if a new administrator is appointed he "shall be liable to the action of a creditor for two years after he has given bond for the performance

of his trust . . . but after the expiration of said two years, he shall, if he has given due notice of his appointment, have the benefit of the limitations provided for original administration."

While the allowance of the amendment summoning the defendant as a party is in a sense a continuation of an existing action, still we are of opinion that it was not the intention of the Legislature that an administrator *de bonis non* under § 17 should be held liable in an action where the right of action has accrued and is originally brought against a former administrator, unless the new administrator is made a party defendant in such action within two years from the date of his appointment, except as is provided in § 18 of the same chapter. That is to say, the liability of an administrator *de bonis non* in such an action is limited to two years from the date of his appointment unless new assets come to his hands, whether the action is brought against him in the first instance or he is made a party to a pending suit originally brought against a former administrator.

To construe the statute as authorizing a creditor to summon in an administrator *de bonis non* after the death, resignation, or removal of the original administrator, after the expiration of two years from the appointment of the new administrator, and when his final account has been allowed and a decree for distribution ordered by the court has been complied with, would be such an interpretation of the legislative intent as might result in manifest injustice and unreasonable delay in the settlement of estates. The statute should not be so construed in the absence of plain and unequivocal language to that effect.

As the defendant had no knowledge of the pending action, and was not made a party to it until more than four years after his appointment, he cannot be held liable. The judge rightly ruled that the special statute of limitations, (R. L. c. 141, § 17,) is a bar to the action.

*Exceptions overruled.*

## LOUIS C. STRATES vs. ANNIE KENIRY.

Worcester. September 30, 1918. — December 18, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE,  
& CARROLL, JJ.*Contract, Construction. Landlord and Tenant.*

The owner of a building on Park Avenue in Worcester which contained eight or more stores, one of which was leased to a corporation called the Cloverdale Company carrying on a grocery and a meat, provision and fish business, made a lease in writing for five years of a store in this building, numbered 423 Park Avenue, providing that the tenant should "carry a general line of groceries, meat, provisions and fish," and containing the following covenant of the lessor: "And the lessor, in consideration of one dollar and other valuable considerations, hereby promises and agrees to and with the lessee that she shall cause the fish market at No. 425½ Park Avenue to be discontinued immediately and further promises and agrees that during the term of said lease she shall not rent any part of the building on premises in which the above said stores are located for any grocery, provision, meat or fish business, except the Cloverdale Store now located at No. 431 Park Avenue." While this lease was in force the Cloverdale Company vacated the store it had occupied and the landlord thereupon executed a lease of that store, 431 Park Avenue, to another corporation for the sale of provisions, meats, groceries and fish. In a suit in equity by the lessee under the lease above described to restrain the lessor from letting 431 Park Avenue for a grocery or a provision, meat or fish business in alleged violation of the covenant quoted above, it was held that there was nothing in the language of the covenant indicating an intention to permit the lessor to let the store numbered 431 for another competing grocery after the Cloverdale Company should vacate the premises, and that the plaintiff was entitled to the injunction prayed for.

In the same case it was said that, the Cloverdale Company having ceased to occupy any store in the defendant's building, it was not necessary to consider, whether the words "Cloverdale Store" in the excepting clause of the covenant referred to the business then carried on by the Cloverdale Company at No. 431 and would authorize a transfer of that business to another store in the defendant's building.

BILL IN EQUITY, filed in the Superior Court on June 12, 1918, by the lessee under a lease in writing dated July 1, 1915, of the store numbered 423 on Park Avenue in Worcester against the lessor praying for an order restraining the defendant from letting another store in the same building numbered 431 on Park

Avenue to be used for a grocery, a provision, meat or fish business in alleged violation of a covenant in the lease.

The case was heard by *Sanderson*, J. The material covenant in the lease is quoted in the opinion, where also the evidence in regard to the circumstances existing at the time of the execution of the lease is described. The judge filed a memorandum of decision, which concluded as follows:

"The provision in the plaintiff's lease which is the principal cause of the controversy is, that the defendant shall not rent any part of the building on premises in which the above said stores are located for any grocery, provision, meat or fish business except the Cloverdale Store now located at No. 431 Park Avenue.

"There seems to have been no reason for making this exception, except the fact that the Cloverdale Company then had a right to continue to do business at 431 Park Avenue because of its written lease.

"The parties apparently intended to eliminate competition in the plaintiff's business so far as they could legally do so."

The judge found that the provision in the plaintiff's lease above referred to created an exception in favor of the Cloverdale Company only, and that it was not intended to give and did not give the defendant the right to lease 431 Park Avenue for a provision, grocery, meat or fish business after it ceased to be occupied by the Cloverdale Company, as the Cloverdale Store.

He ordered that a decree should be prepared enjoining the defendant from permitting the store at 431 Park Avenue to be rented, leased or occupied for the purpose of carrying on any grocery, provision, meat or fish business, and awarding costs to the plaintiff taxed as in an action at law.

Later by order of the judge a final decree in accordance with the memorandum of decision was entered; and the defendant appealed.

The case was submitted on briefs at the sitting of the court in September, 1918, and afterwards was submitted on briefs to all the justices.

*D. F. O'Connell & T. A. McAvoy*, for the defendant.

*J. H. Meagher, E. Zaeder & C. J. O'Connell*, for the plaintiff.

DE COURCY, J. The circumstances under which the lease was executed, as found by the judge or undisputed, were as follows: The defendant owned a building on Park Avenue in Worcester, containing eight or more stores. The plaintiff hired the store numbered 423 and 425, for five years from July 1, 1915, the lease providing that he should "carry a general line of groceries, meat, provisions and fish." The Cloverdale Company then was carrying on a similar business in the defendant's building at number 431, under a written lease. This company had a series of stores, the one at 431 Park Avenue being known as Cloverdale Store numbered fifty. On the outside were the words "Cloverdale Company" and "Cloverdale Store." The covenant in controversy in the plaintiff's lease, is as follows:

"And the lessor, in consideration of one dollar and other valuable considerations, hereby promises and agrees to and with the lessee that she shall cause the fish market at No. 425½ Park Avenue to be discontinued immediately and further promises and agrees that during the term of said lease she shall not rent any part of the building on premises in which the above said stores are located for any grocery, provision, meat or fish business, except the Cloverdale Store now located at No. 431 Park Avenue."

Before April 26, 1918, the Cloverdale Company vacated the store it had occupied; and the defendant executed a lease of it to the Community Stores Company, a corporation which maintained a series of stores for the sale of provisions, meats, groceries and fish. The plaintiff thereupon brought this bill in equity to restrain the defendant from permitting said No. 431 to be occupied for this competing business. A decree was entered in his favor, from which the defendant appealed.

The contention of the defendant is, that while she covenanted not to rent any part of her building for carrying on the same business in which the plaintiff was engaged, she excepted from that covenant the premises numbered 431. If such were the intention of the parties presumably they would have expressly so stated. What they did in fact take out of the covenant was not "No. 431 Park Avenue" but the "Cloverdale Store" which then was "located at" that place. There is nothing in the language they used which indicates an intention to permit the

lessor to let the store numbered 431 for another competing grocery business after the Cloverdale Company should vacate the premises.

If the language itself left any doubt as to whether the parties intended entirely to exclude these premises from the operation of the covenant, that doubt would be removed by reading the lease in the light of the facts surrounding the parties when it was executed. The plaintiff was binding himself for a period of five years, not merely to pay rent for the store numbered 423-425 Park Avenue, but "to keep said stores open for business every business day during the continuance of this lease, and to carry a general line of groceries, meat, provisions and fish, except by special permission." There was then a fish market in the adjoining store, numbered 425½. This was to be discontinued immediately. In the same building, at number 431, was another grocery and provision business, carried on by the Cloverdale Company; but that company had a written lease, not yet expired.

In the opinion of a majority of the court the trial judge rightly ruled that the plaintiff's rights were violated by the defendant when she undertook to lease to the Community Stores Company the premises numbered 431 Park Avenue.

As the Cloverdale Company vacated the building before the present controversy arose, it is unnecessary to consider whether the words "Cloverdale Store" in the clause limiting the covenant refer to the business then conducted by that company at No. 431, and would authorize a transfer of the business from that place to another store in the defendant's building.

*Decree affirmed with costs.*

## JOHN J. DALTON vs. AMERICAN AMMONIA COMPANY.

Suffolk. October 16, 1918. — December 30, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Judgment. Res Judicata.*

In an action in the Superior Court for alleged breach of a contract in writing to employ the plaintiff as a salesman for one year at a salary of \$50 a week and a further compensation at the end of the term, the defendant set up the alleged defence that the plaintiff broke his contract and that the defendant discharged him rightly for that reason. The plaintiff contended that a previous judgment of the Municipal Court of the City of Boston in favor of the plaintiff precluded the defendant from showing that the plaintiff had broken his contract before the date of that judgment. It appeared that the previous action was brought, seven months after the date of the contract of employment, upon an account annexed, the first three items being of \$50 each for services rendered by the plaintiff as a salesman in three successive weeks, each of the last two weeks ending after the date of the writ, and the other items being for expenses. The judge of the Municipal Court had found that the plaintiff was discharged by the defendant without justification. He had ruled that the plaintiff could not recover on the two items for salary that became due after the date of the writ and had found for the plaintiff upon the first item for salary and for certain expenses. Judgment was entered in the Municipal Court for the plaintiff in accordance with this finding. *Held*, that this judgment was conclusive of the fact that the plaintiff had performed his contract up to the end of the week for which he was held to be entitled to his salary, and that the defendant in the action in the Superior Court was precluded from showing the contrary.

CONTRACT for the alleged breach of an agreement in writing to employ the plaintiff as salesman for one year from September 15, 1913, at a salary of \$50 a week and all travelling and other reasonable expenses and a further compensation payable at the end of the term of two hundred and fifty shares of the capital stock of the defendant of the par value of \$10 a share. Writ in the Superior Court dated June 8, 1914.

The case was tried before *Bell, J.* The evidence in regard to the previous action between the same parties in the Municipal Court of the City of Boston is described in the opinion. At the close of the evidence the plaintiff, among other requests, asked the judge to make the following rulings:

"2. The judgment of the Municipal Court of the City of Boston is conclusive evidence of the existence of the contract sued on and of its performance by the plaintiff up to April 11, 1914."

"6. The defendant is estopped to show any cause for discharge of the plaintiff that existed prior to April 11, 1914."

"7. If the jury find that the contract relied on was litigated in the Municipal Court action, then that establishes performance of it by the plaintiff up to April 11, 1914."

"12. The plaintiff performed his contract up to April 11, 1914."

"13. The defendant is estopped from showing any breaches of contract by the plaintiff prior to April 11, 1914."

The judge refused to make any of these rulings, and ruled "that the matter of the discharge of the plaintiff was not in issue in the action in the lower court; that whether or not the discharge was justified was not in issue in the lower court, and that evidence could be introduced in the present action to show that there was no discharge, and that, if there was a discharge, the defendant was justified in making it."

The judge submitted to the jury four questions, which with the answers of the jury were as follows:

"1. Did or did not the plaintiff fail in his duty toward the defendant in any material respect which was not waived?" The jury answered, "He did."

"2. Did or did not the defendant discharge the plaintiff on Saturday, April 11, 1914?" The jury answered, "Did not."

"3. If the jury find that the plaintiff had failed in his duty toward the defendant in any material respect which was not waived or that the defendant did not discharge the plaintiff, they will not answer this third question."

"Otherwise, what sum is a fair and just compensation to the plaintiff for any damage caused to him by his discharge?" The jury did not answer this question.

"4. Was or was not the question whether the plaintiff was wrongfully discharged actually tried in the Municipal Court of the City of Boston?" The jury answered, "It was not."

Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*J. J. Walsh*, for the plaintiff.

*E. R. Anderson*, (*H. Guild* with him,) for the defendant.



CROSBY, J. This is an action to recover damages for the alleged breach of a written contract. By the terms of the contract the defendant agreed to employ the plaintiff as a salesman for one year from September 15, 1913, at a salary of \$50 a week, and to pay his travelling and other reasonable expenses; and at the end of the year, upon full performance by the plaintiff, to assign and deliver to him two hundred and fifty shares of the capital stock of the defendant corporation.

It is the contention of the plaintiff that a judgment recovered by him against the defendant in the Municipal Court of the City of Boston is *res judicata* upon the question whether the plaintiff performed the contract in accordance with its terms, and whether a breach thereof was committed by the defendant. In other words, the question is, whether the judgment in the first action precludes the defendant from showing in the case at bar that there was a breach of the contract by the plaintiff, and that the defendant did not wrongfully discharge him.

In order to determine that question it is necessary to consider what was properly tried in the action in the Municipal Court. It appears from the record that it was an action of contract upon an account annexed, — the first three items being \$50 each for the weeks ending respectively April 11, 18 and 25, 1914, for services rendered by the plaintiff as a salesman, and the other items for travelling and other expenses, and credits given for cash received. The defendant's answer was a general denial and payment. The judge of the Municipal Court properly ruled that the plaintiff could not recover upon the second and third items — as the writ was dated April 13, 1914, it is plain that the plaintiff could not recover for services rendered after that date — and found for the plaintiff upon the first item and for certain expenses. Judgment was entered in accordance with the finding.

Where services are rendered in accordance with the terms of a written contract of employment, the employee may maintain an action upon an account annexed for such services and expenses as are then due and payable. *Cullen v. Sears*, 112 Mass. 299, 308. In an action upon an account annexed the burden of proof was upon the plaintiff to show that he had performed the written contract in order that he might prevail. Under the gen-

eral denial it would have been competent for the defendant to have proved that the plaintiff had not performed his part of the contract. *Marvin v. Mandell*, 125 Mass. 562, 563. *Starratt v. Mullen*, 148 Mass. 570. *Wylie v. Marinofsky*, 201 Mass. 583, 584. *Hughes v. Williams*, 229 Mass. 467, 470. It would not be performance of his contract by the plaintiff for him so to conduct himself as would warrant his discharge by the defendant. The judge of the Municipal Court found that on April 11, 1914, the plaintiff was discharged by the defendant without justification; and that on April 13, 1914, the action was brought. He also found that on April 11, the treasurer of the defendant company said to the plaintiff "Dalton you are discharged. You discharged yourself by leaving Pittsburg . . .;" and that the plaintiff left Pittsburg and came to Boston on April 9 or 10, 1914. It is apparent that, if the defendant was justified in discharging the plaintiff, it would have been a defence to the original action, and presented an issue which could have been tried and adjudicated in that action. There is nothing to show that the defendant waived that defence. Upon this issue the judge of the Municipal Court found that on April 11, 1914, the plaintiff was discharged by the defendant without justification. The issue whether the plaintiff had performed his contract during the week ending April 11, 1914, was directly involved on the pleadings. That was a question which in law not only might have been tried but which the record shows was actually tried and adjudicated. Hence the rule of *res judicata* must apply. *Foye v. Patch*, 132 Mass. 105, 110. *Watts v. Watts*, 160 Mass. 464. *Corbett v. Craven*, 193 Mass. 30. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41.

The exceptions to the refusal of the court to give the plaintiff's requests two, six, seven, twelve and thirteen, must be sustained.

*Ordered accordingly.*

## EDWARD R. PURCHASE vs. RALPH H. SEELYE.

Hampden. October 28, 1918. — December 30, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Physicians and Surgeons. Release. Proximate Cause. Evidence, Relevancy.*

An employee of a railroad corporation in the course of his work suffered a rupture in his right groin and went for treatment to a surgeon, who the next day mistook him for another patient and performed an operation on his left side. This mistake made it necessary for the surgeon to perform another operation on the right side. The employee made a claim on the railroad corporation for alleged negligence causing his rupture. This claim was settled, and the employee executed and delivered to the corporation a release of all claims and demands "arising or which may arise out of said injury." Later he brought an action of tort against the surgeon for his injuries sustained by reason of the defendant's negligence in performing the operations. The defendant alleged in defence his discharge from liability by the release of the railroad corporation as one of two alleged tortfeasors. *Held*, that the negligent act of the defendant in mistaking the plaintiff for another patient and operating on the wrong side was not a natural and probable result of the first injury and created a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release.

In the same case it was *said* that it was unnecessary to consider, whether the railroad corporation would have been liable for the aggravation of the plaintiff's injury caused by the defendant's mistake in operating on the wrong side if there had been no mistake in regard to the identity of the patient.

In the same case it also was *held* that for the reasons stated above the release was not admissible in evidence.

TORT against a surgeon for personal injuries sustained by the plaintiff by reason of the negligence of the defendant in operating on the plaintiff for hernia on March 26, 1916, and, after having ascertained that the plaintiff was suffering from a hernia on the right side of his abdomen, negligently performing an operation on the left side of the plaintiff's body without the plaintiff's knowledge or consent. Writ dated October 3, 1916.

The answer, besides a general denial and an allegation of negligence on the part of the plaintiff, alleged that the defendant was discharged from liability for the plaintiff's cause of action by the following release:

"Boston & Albany Railroad  
N. Y. C. R. R. Co. Lessee

I Edward R. Purchase of Ludlow Mass hereby acknowledge the receipt of Two hundred and five dollars (\$205.00) in full satisfaction and discharge of all claims, demands, actions and causes of action which I have against The Boston & Albany Railroad Company, or The New York Central Railroad Company, or any of the officers, agents or servants of them or either of them by reason of an injury to my Property or Person at West Springfield Mass on or about the twenty-first day of March A. D. 1916, and I hereby release and discharge said Corporations, the officers, agents and servants of them or either of them from all claims, demands, actions and causes of action, arising, or which may arise out of said injury, and covenant that no suits shall ever be brought thereon or on any thereof by me or any other person.

I have read the above and agree to it

Witness my hand and seal this 19th day of July A. D. 1916.

In presence of

Samuel T. Bennett

Edward R. Purchase. [Seal]"

In the Superior Court the case was tried before *Callahan, J.* The material evidence is described in the opinion. The release, as printed above, was admitted in evidence subject to the plaintiff's exception. Upon motion of the defendant the judge ruled that the release was a bar to the action and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

*N. M. Harvey & J. H. Mulcare*, for the plaintiff.

*A. L. Green & F. F. Bennett*, for the defendant.

CROSBY, J. This is an action to recover for an unauthorized surgical operation performed by the defendant, a surgeon, upon the body of the plaintiff.

On March 21, 1916, the plaintiff suffered a rupture in his right groin while in the employ of the Boston and Albany Railroad, of whose road the New York Central Railroad Company was lessee; on the same day he consulted the defendant, and the next day was operated on by the latter. The following day the plaintiff discovered that the operation had been performed on his left side, and so stated to the defendant. The plaintiff

testified that the defendant said: "I took you for another patient of mine that had a hernia on the left side. — Well, the only thing we can do is to operate on the right side in about two or three days." Afterwards an operation was performed by the defendant upon the plaintiff's right side.

On July 19, 1916, the plaintiff made a settlement of his claim against the railroad company and executed and delivered to it a release of all claims and demands "arising or which may arise out of said injury." This action having been brought since the settlement, an important question is whether it is barred by the release.

If the plaintiff's employer, in an action brought against it to recover for the original injury, would have been liable for the negligence of the defendant in improperly treating the plaintiff, then the release included such damages and is a bar to the present action, for the reason that in such a case the plaintiff had a claim against both the railroad company and the defendant for the same cause of action and a release of one of the alleged wrongdoers would operate as a release of both. *Brewer v. Casey*, 196 Mass. 384. *Stimpson v. Poole*, 141 Mass. 502. *Leddy v. Barney*, 139 Mass. 394. *Brown v. Cambridge*, 3 Allen, 474.

It is the contention of the plaintiff that the alleged negligence of the defendant had no causal relation to the original injury, but created a new, separate and independent cause of action, the liability for which was not barred by the release.

It is well settled in this Commonwealth, and in many other jurisdictions, that in an action for personal injuries arising out of the alleged negligence of the defendant, the plaintiff is entitled to recover for the injuries resulting from the defendant's negligence although such injuries are aggravated by the negligence of an attending physician if, in his selection and employment, the plaintiff was in the exercise of reasonable care. *McGarrahan v. New York, New Haven, & Hartford Railroad*, 171 Mass. 211, 219. *Gray v. Boston Elevated Railway*, 215 Mass. 143, and cases cited.

The question is whether the act of the defendant in operating by mistake upon the plaintiff's left side was a natural and probable result of the negligence of the railroad company. We are of opinion that the general rule as above stated is not applicable

to the case at bar. There was sufficient evidence to show that the defendant made a mistake in the identity of the plaintiff at the time the operation was performed and that he then believed he was operating upon another patient who had a hernia on his left side. The reason why a wrongdoer is held liable for the negligence of a physician whose unskilful treatment aggravates an injury, is that such unskilful treatment is a result which reasonably ought to have been anticipated by him.

The railroad company could not be held liable because of the defendant's mistaken belief that he was operating upon some person other than the plaintiff. Such a mistake was not an act of negligence which could be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made. The fact that the mistake made by the defendant might possibly occur is not enough to charge the railroad company with liability; the unskilful or improper treatment must have been legally and constructively anticipated by the original wrongdoer as a rational and probable result of the first injury. This is the true test of responsibility, and it cannot be extended to cover the facts in the present case as shown by the record.

If a surgeon employed to operate upon a patient for hernia caused by the negligence of another, instead of performing that operation removes one of the patient's kidneys (which is in sound condition) under the mistaken belief that he is treating another patient, can it reasonably be held that such a mistake is something that might sometimes follow, and as a matter of common knowledge and experience might be expected sometimes to follow, from an injury resulting in hernia? We think not. We are of opinion that the act of the defendant in operating on the wrong side, was a wholly wrongful, independent and intervening cause for which the original wrongdoer was in no way responsible.

All the cases cited and relied on by the defendant are distinguishable from the case at bar because of the fact that the defendant did not intentionally operate upon the plaintiff for the injury received, as he did in those cases, but mistakenly understood and believed that he was operating upon another patient for a different injury.

It is unnecessary to decide whether the railroad company

would have been liable for the aggravation of the plaintiff's injury caused by the mistake of the defendant in operating upon the wrong side, had there been no mistake with reference to the identity of the patient.

In some jurisdictions it is held that in an action against the original wrongdoer, if a surgeon by mistake operates at a place other than at the seat of the injury and without the consent of the patient, such an act is a natural and probable consequence of the original injury for which the defendant is responsible. *Martin v. Cunningham*, 93 Wash. 517. *Thompson v. Louisville & Nashville Railroad*, 91 Ala. 496. *Sauter v. New York Central & Hudson River Railroad*, 66 N. Y. 50. *Variety Manuf. Co. v. Landaker*, 227 Ill. 22. *Reed v. Detroit*, 108 Mich. 224. *Seeton v. Dunbarton*, 73 N. H. 134. *Lyons v. Erie Railway*, 57 N. Y. 489. *Goss v. Goss*, 102 Minn. 346. See also *Mohr v. Williams*, 95 Minn. 261; *Sullivan v. McGraw*, 118 Mich. 39; *Pratt v. Davis*, 224 Ill. 300. The facts in the case at bar distinguish it from the cases above referred to.

If we assume that the release is valid and a bar to any claim which the plaintiff had against the railroad company, still a majority of the court are of opinion, for the reasons stated, that it is not a defence to the present action and was not admissible in evidence.

The exceptions to the admission in evidence of the release and the ruling that it was a bar to the action, must be sustained.

*Ordered accordingly.*

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GEORGE H. BLOOD (afterwards ELLEN BLOOD, administratrix,) vs. JOHN D. ANSLEY.

Suffolk. October 28, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Negligence*, Invited person, Of one controlling real estate, Unguarded well in floor of building, Contributory.

An inventor of a pattern for a mechanical device, who had sent it to a foundry to have a casting of it moulded, received a message from the foundry that there was some trouble with the casting and asking him to have some one

come over to see about the measurements. The inventor went himself to the foundry and, finding no one in the office, went into the moulding room. There he was shown the casting but it was too dark in the moulding room to see the measurements and the plaintiff, carrying the casting and accompanied by two workmen of the foundry, walked to the rear of the foundry room and toward the outer door of the "tumbling room" to get where there was more light, and in doing so stepped into a well in the floor and was injured. In an action brought by him against the proprietor of the foundry for his injuries thus sustained, it was *held* that the jury were warranted in finding that the plaintiff was on the defendant's premises by invitation and that it could not be said as matter of law that the invitation was confined to one particular part of the foundry.

In an action against the proprietor of a foundry for personal injuries sustained by reason of falling into a well in the floor of the foundry, to which the plaintiff had been invited for the purpose of inspecting a pattern for a casting, it appeared that the plaintiff never had been in the building before and was not told of the existence of the well, that he was walking to the rear of the foundry room toward an outer door to get where there was more light, looking at the pattern and measuring it when, as he testified, "the first thing I knew my right foot went down this hole." *Held*, that, it was a question of fact for the jury whether the defendant's duty did not require him to guard the well or to see that the plaintiff should be warned of its existence, and accordingly that the question of the defendant's negligence was for the jury.

In the case above described it appeared that the plaintiff did not look down to see where he was stepping, but it was pointed out that the jury, who viewed the premises, might have found that the well was not so obvious that the plaintiff would have noticed it by looking, and it was *held* that, with the presumption created by St. 1914, c. 553, it could not be said that it was error for the presiding judge to submit to the jury the question of the plaintiff's contributory negligence.

TORT, brought originally by George H. Blood, of Boston, and, upon his death, which occurred about two years after the trial, allowed to be prosecuted further by Ellen Blood, the administratrix of his estate, for personal injuries sustained on June 13, 1914, by falling into a well or cistern in the floor of the defendant's foundry in Everett, to which the original plaintiff had been invited for the purpose of inspecting a pattern for a casting. Writ dated June 3, 1915.

In the Superior Court the case was tried before *Sanderson, J.* The evidence is described in the opinion. At the close of the plaintiff's evidence the defendant asked the judge to rule that the plaintiff was not in the exercise of due care; that his own act contributed to the accident and that he could not recover. The judge refused to make this ruling upon the ground that under



the provisions of St. 1914, c. 553, there was a presumption that the plaintiff was in the exercise of due care and contributory negligence was made an affirmative defence to be proved by the defendant.

At the close of all the evidence the defendant asked the judge to make the following rulings:

"1. That, upon the evidence of the plaintiff, he was not in the exercise of due care and his negligence contributed to the injury.

"2. That, upon the plaintiff's evidence, he cannot recover.

"3. That, upon the evidence of the plaintiff, the plaintiff was not in the exercise of due care and his negligence contributed to the injury and he cannot recover.

"4. Upon the whole evidence the plaintiff is not entitled to recover."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,000. The defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in October, 1918, and afterwards was submitted on briefs to all the justices.

*H. H. Newton*, for the defendant.

*F. W. Mansfield*, for the plaintiff.

DE COURCY, J. The plaintiff's intestate suffered personal injuries on June 13, 1914, by falling into a well or cistern in the defendant's foundry. The building is on the southerly side of Crescent Street in Everett, is thirty feet in width by ninety feet in length, and divided into four rooms. In the northeast corner facing the street is an office, and connecting with it is a pattern room, in the northwest corner. Back of these is the moulding room, extending fifty feet in depth and the full width of the building. Here is where most of the work is performed, the castings made and the flasks set. Back of the moulding room, and connected with it by a wide doorway in the centre of the partition, is the tumbling room, which has windows on the westerly and southerly sides, and on the easterly side a door four feet wide by five feet eight inches high, opening out into the yard. Near this outside door, and between it and the southerly wall of the building, is a spring of water enclosed in a concrete barrel.

about four feet in diameter. The spring is planked over, and has a door sixteen by twenty-eight and one half inches, which opens on hinges back against the easterly wall of the building and is fastened by a catch. In the tumbling room are the furnace, heater, emery wheel, motor and grindstone, and at the time of the accident there were castings, barrels and boxes scattered about the floor, — three barrels and a pile of castings being near the spring according to some of the testimony. The floors of both the moulding room and the tumbling room were of cement, and the top cover of the spring was raised about an inch above the floor.

On the evidence most favorable to the plaintiff the jury could find the following facts as to the accident: The plaintiff's intestate, George H. Blood (hereinafter referred to as the plaintiff), a pattern maker and inventor, had taken to one Murphy a pattern of a mechanical device, and Murphy had sent it to the defendant Ansley to have a casting moulded. When the casting was ready for inspection, the defendant notified Murphy that there was some trouble with it and told him to have some one come over and see about the measurements; and accordingly, at Murphy's suggestion, the plaintiff went to the foundry for that purpose. Finding no one in the office he went into the moulding room. There he saw Cilka, a moulder whom he knew, inquired for Ansley, and said he had come to see the pattern. Cilka had been told by the defendant that the core on that "core box" or pattern was wrong. Another workman, one Carey, who had done the work and knew that there was something wrong about it, had left the pattern in the tumbling room where he could find it, after hearing the defendant say that somebody was coming to look it over. In answer to the plaintiff's inquiry Cilka said that Ansley had gone off in an automobile, and thereupon he brought the finished casting, and Carey brought the pattern, or "core box," to the plaintiff. Blood took out his rule or scale to measure the pattern, but it was too dark in the moulding room to see the measurements. With Cilka by his side, and Carey close behind carrying the casting, the plaintiff walked to the rear of the foundry room, to get where there was more light, and toward the outer door of the tumbling room, looking at the pattern and measuring it, and, as he testified,

"the first thing I knew my right foot went down this hole." He never before had been on the premises, and neither of the men told him about the well. These workmen had no instructions not to allow people to go into the tumbling room, and they had seen the defendant himself go there with other people to look at castings.

The jury were warranted in finding that the plaintiff was on the premises by invitation, and we cannot say as matter of law that the invitation was confined to one particular part of the foundry. The defendant was bound to exercise reasonable care to keep the premises safe for use according to his invitation, and it was a question of fact for the jury whether that duty did not require the defendant to safeguard this well, which was near the approach to the door, either by providing some barrier, or keeping the view of it unobstructed, or seeing to it that the plaintiff should be warned of its existence. *Hendricken v. Meadows*, 154 Mass. 599. *Ginns v. C. T. Sherer Co.* 219 Mass. 18.

On the issue of the plaintiff's due care, his failure to look down to see where he was stepping tends to show that he was careless. Yet the danger which he encountered was not a casting or other obstruction ordinarily to be expected in a foundry, but a well, and the jury, who viewed the premises, may have found that it was not so obvious that the plaintiff would have noticed it by looking. *Marston v. Reynolds*, 211 Mass. 590. *Regan v. Boston & Maine Railroad*, 224 Mass. 418. *Smith v. New England Cotton Yarn Co.* 225 Mass. 287. Especially in view of St. 1914, c. 553, creating a presumption of due care on the part of the plaintiff and making his contributory negligence an affirmative defence to be proved by the defendant, we cannot say that the trial judge erred in submitting this issue to the jury, with appropriate instructions. *Nye v. Louis K. Liggett Co.* 224 Mass. 401. *Duggan v. Bay State Street Railway*, 230 Mass. 370.

In the opinion of a majority of the court the exceptions must be overruled; and it is

*So ordered.*

## SAMUEL Z. GOLDBERG vs. R. FEDERMAN.

Suffolk. November 13, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, &amp; CARROLL, JJ.

*Evidence, Presumptions and burden of proof, Circumstantial. Negligence, Overflowing water.*

In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, it appeared that the top or fifth floor had been vacant for about a month, that on the afternoon of the day of the damage the defendant with employees was working in his loft, which he and his employees left at about a quarter to five o'clock, locking the doors, and did not return, that at about half past eight o'clock in the evening of the same day the owner of the building, after finding the doors locked, forced a window in the defendant's loft and discovered water flowing at full pressure from the faucet into the sink and the sink full of water overflowing upon the floor. The next morning a witness visited the fifth floor above the defendant's loft and found no signs of water there. The plaintiff's wall-paper stock was injured by water from above. *Held*, that on this circumstantial evidence a finding for the plaintiff was warranted.

In the case above described the defendant, when called by the plaintiff as a witness, testified that the faucet and sink were used only once during the day of the accident and then by a man working on the outside of the building, who washed blood from his injured hand. *Held*, that the trial judge was not precluded by this evidence from drawing the inference that the overflowing of the water was caused by negligence of the defendant or of one of his servants.

TORT for damage by water to the plaintiff's wall-paper stock stored on the third floor of the building numbered 10 and 12 on Lyman Street in Boston, alleged to have been caused by the negligence of the defendant and his servants, who occupied the fourth floor of the same building also for the storage of wall-paper. Writ in the Municipal Court of the City of Boston dated December 30, 1916.

At the trial in the Municipal Court the judge refused to rule upon the evidence, which is described in the opinion, that "On all the evidence the plaintiff is not entitled to recover." He found for the plaintiff in the sum of \$163.35, and at the request of the defendant reported the case to the Appellate Division.

The Appellate Division made an order that the report be dismissed; and the defendant appealed.

*E. M. Dangel*, for the defendant, submitted a brief.

No brief was filed for the plaintiff.

RUGG, C. J. This is an action of tort to recover for damages by water to wall-paper stock. The plaintiff and the defendant are competitors in the wall-paper business. The plaintiff occupied the third and the defendant the fourth floor or "loft" of a comparatively new building, each as tenant using the space for storage. The top or fifth floor of the building had been vacant for about a month before the event here in question. Neither the plaintiff nor the defendant exercised any control over the plumbing, which was under the charge of the owner. On the afternoon of December 27, 1916, an employee of the plaintiff was shipping wall-paper from his loft, leaving the premises about six o'clock, and the defendant with employees was working in his loft, which he quitted about a quarter before five o'clock, leaving both doors locked, and did not return. The owner of the building testified that at about half past eight o'clock of the same evening he forced a window in the defendant's loft, after finding both doors locked, and discovered water flowing from the faucet into the sink at full pressure and the sink full of water overflowing on to the floor. The next morning a witness visited the fifth floor, but found no signs of water. The plaintiff's wall-paper stock was injured by water from above.

The grievance of the defendant is a refusal to rule that on all the evidence the plaintiff was not entitled to recover, and a finding for the plaintiff.

There is no error of law on this record. It is the typical case for decision upon circumstantial evidence. It was for the tribunal established to try the facts to draw whatever inference seemed most rational from the fact that an open faucet running at full pressure and overflowing its receptacle was found in a fourth story loft with all doors locked, in the exclusive occupation of the defendant, where he with his servants had been working and which he had left after locking its doors less than four hours before. The trial judge was not precluded from drawing the inferences which seemed likely simply because the defendant, called by the plaintiff as a witness, testified that the faucet

and sink were used only once during that day, and then by a workman on the outside of the building, who washed blood from his injured hand. The doctrine of *Buckland v. New York, New Haven, & Hartford Railroad*, 181 Mass. 3, and *Winship v. New York, New Haven, & Hartford Railroad*, 170 Mass. 464, has no application to the facts here disclosed.

*Order dismissing report affirmed.*

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HAGOP SOGHOMONIAN & others vs. THOMAS GARABEDIAN  
& others.

Worcester. November 27, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Corporation*, Stockholder's remedy, Suit by judgment creditor. *Equity Jurisdiction*, To set aside corporate mortgage, Plaintiff must come into court with clean hands, Bill by judgment creditor of corporation. *Wrongdoer without Remedy*.

- A suit in equity by stockholders in a corporation to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by a proper vote of the directors cannot be maintained without alleging and proving that the plaintiffs first sought in vain to obtain relief through a suit brought by the corporation itself or alleging and proving a valid excuse for not doing so.
- A judgment creditor of a corporation cannot maintain a suit in equity to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by a valid vote of the directors, where it appears that the plaintiff had full cognizance of and acquiesced in the execution of the mortgages in controversy and also that he obtained his judgment by misleading the officers of the corporation and preventing them from contesting the action in which he obtained it.

BILL IN EQUITY, filed in the Superior Court on April 20, 1917, by three stockholders in the Northern Brass Company, a corporation, one of whom, the plaintiff Boyajian, was alleged also to be a judgment creditor of that corporation, against five other stockholders in the corporation, two of whom were directors, seeking to restrain the foreclosure of certain mortgages executed by the corporation, as described in the bill, to cancel those mortgages and for an accounting, on the ground that the mortgages

in question were not authorized by a valid vote passed at a proper meeting of the board of directors of the corporation.

The case was referred to an auditor, who filed a report containing, among other findings, those that are stated in the opinion. Later the case was heard by *J. F. Brown, J.*, who made a memorandum of decision as follows: "It not appearing that the Northern Brass Company, the mortgagor in the two mortgages in question, has acted in the matter or has been requested to act and has refused to act, I am of the opinion that these plaintiffs cannot maintain their bill. Let a decree be entered dismissing the bill with costs."

Later by order of the judge a final decree was entered in accordance with the memorandum of decision dismissing the bill with costs. The plaintiffs appealed.

*A. Monroe*, for the plaintiffs, submitted a brief.

No brief was filed for the defendants.

DE COURCY, J. The plaintiffs are stockholders in the Northern Brass Company, and brought this suit to restrain the defendants from foreclosing two mortgages held by them on the real and personal property of that corporation. The bill alleges that the meeting of the directors at which the mortgages were authorized was not a legal one, and that the mortgages as executed were not authorized by the votes that were passed. The trial judge dismissed the bill on the ground that the mortgagor, the Northern Brass Company, had not acted nor been requested to act in the matter.

The judge was right. The remedy should be sought and recovered by the corporation which suffered the wrong complained of. It does not appear that the plaintiffs have made any effort to obtain relief through the corporation itself, nor do they allege or prove a legal excuse for not doing so. *Bartlett v. New York, New Haven, & Hartford Railroad*, 221 Mass. 530; *S. C.* 226 Mass. 467.

The plaintiff Boyajian also alleges that he is a judgment creditor of the corporation. The bill was not demurred to as being multifarious. It appears from the master's report not only that Boyajian had full cognizance of and acquiesced in the execution of the mortgages in controversy, but that he obtained his judgment by misleading the officers of the corporation and prevent-

ing them from contesting his action. The question of his right to maintain the bill as a judgment creditor apparently was not urged in the Superior Court. But assuming that it is properly before us, it is enough to say that on the facts found by the master he would be estopped from maintaining this bill, even if otherwise entitled to recover.

*Bill dismissed with costs.*

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JENNIE OLES vs. MARY DUBINSKY.

AUGUSTUS N. OLES vs. SAME.

Middlesex. December 3, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, Of one controlling real estate, Contributory. Landlord and Tenant.*

In an action by a woman, who occupied with her husband the top floor of a three-story apartment house, against the owner of the house for personal injuries caused by the giving way of a step forming part of a "bulkhead" stairway leading from the yard of the house to the cellar as a common stairway for the use of all the tenants, it could have been found that the step which gave way was apparently sound, but that the accident disclosed the fact that a bracket on the stringer which supported the step was broken and rotted, that two or three weeks earlier the defendant had been notified that the bottom step was missing and that the bulkhead doors were in a broken condition, allowing the snow and rain to fall on the steps. *Held*, that there was evidence for the jury of the defendant's negligence.

In the action above described the answer alleged contributory negligence of the plaintiff. Although it appeared that the stairs were in poor condition and often were wet, the plaintiff testified that they looked "all right to go down" and that on this particular day she was using more than the usual amount of care. *Held*, that it could be found that the defect which caused the plaintiff's injury was not an obvious one and that under St. 1914, c. 553, the question of the plaintiff's negligence was for the jury.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained on May 9, 1916, by the giving way of a step of a common stairway leading to the cellar of a three-story house owned by the defendant in which the plaintiff with her husband occupied the top floor as tenants of the defendant, and the second action by the husband of the plaintiff in the first



action for expenses incurred by reason of her injuries. Writs dated July 22, 1916.

In each case the answer alleged that the negligence of the plaintiff in the first case contributed to her injury.

In the Superior Court the cases were tried together before *Keating, J.* The evidence is described in the opinion. The judge submitted the cases to the jury, who returned a verdict for each of the plaintiffs, in the first case in the sum of \$475 and in the second case in the sum of \$35. Thereupon the judge reported the cases for determination by this court with a stipulation of the parties that, if the cases should have been submitted to the jury, judgments should be entered upon the verdicts; otherwise, that in each case judgment should be entered for the defendant.

The cases were submitted on briefs.

*B. Berenson*, for the defendant.

*E. E. Spear*, for the plaintiffs.

*DE COURCY, J.* The plaintiff Jennie Oles (herein referred to as the plaintiff) occupied the top floor of a three-story apartment house, as tenant of the defendant. She was injured while descending a "bulkhead" stairway, leading from the yard to the cellar. On the evidence this was a common stairway for the use of all the tenants, and its control remained in the landlord. The defendant consequently owed the plaintiff the duty of using reasonable care to keep it in as safe a condition for its intended use as it was or appeared to be at the beginning of the tenancy. *Looney v. McLean*, 129 Mass. 33. *Andrews v. Williamson*, 193 Mass. 92. *Ward v. Blouin*, 210 Mass. 140. *Flanagan v. Welch*, 220 Mass. 186.

It could be found that the step which gave way was apparently sound; but the accident disclosed that a bracket on the stringer which supported it was broken and rotted; that two or three weeks earlier the defendant had been notified that the bottom step was missing and that the bulkhead doors were in a broken condition, allowing the snow and rain to fall upon the steps. Without further reciting the testimony in detail, there was evidence for the jury of the defendant's negligence.

The same is true as to the plaintiff's due care. Although the stairs were in poor condition, and often wet, according to her testimony they looked "all right to go down;" and, owing to

her physical condition, she was using "more than the usual amount of care on this particular day." The defect which caused her injury was not an obvious one. And she is entitled to the benefit of the due care statute. *Stagnaro v. Fitzgerald*, 224 Mass. 265. St. 1914, c. 553.

No question of pleading was raised. The action of the plaintiff, and that of her husband for consequential damages, were submitted to the jury rightly. In accordance with the report, the entry in each case must be

*Judgment on the verdict.*

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COMMONWEALTH vs. CHARLES E. PEAKES.

Suffolk. December 3, 4, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Forgery. Larceny. Evidence, Of criminal intent, Competency, Best and secondary.*

At a trial on an indictment for larceny and forgery, where it appears that the defendant, who was the treasurer of a manufacturing and importing corporation, by means of deceits and forgeries misappropriated for his own use sums of money belonging to the corporation, and where the defendant contends and asks the judge to rule that, if the defendant took the money in payment of a debt which the corporation owed him and acted under an honest belief that he had a legal right to resort to the methods shown by the evidence, he cannot be found guilty, it is right for the judge to instruct the jury that, if there was no debt due to the defendant from the corporation, this defence fails.

In the same case it was *held* that the false and fraudulent making or alteration of receipts for foreign drafts, which were described properly in the indictment as being each "an accountable receipt for money," constituted forgery within the meaning of R. L. c. 209, § 1.

The "intent to injure or defraud" which is included in the definition of forgery contained in R. L. c. 209, § 1, is a general intent to defraud any one in accordance with R. L. c. 218, § 30.

Where the treasurer of an importing corporation in purchasing for the corporation foreign drafts from a bank, for the purpose of deceiving the cashier, bookkeeper and auditor of the corporation, fraudulently altered and raised the amounts of the receipts given him by the bank for the money paid for the drafts, misappropriating for himself the difference between the false amounts inserted by him and the true ones, and causing it falsely to appear that the bank had bound itself to transmit larger sums in foreign money than

- it had contracted to do, an intent to defraud is a necessary inference from these acts, making the alteration of the receipts forgery.
- Even if the treasurer committing these acts believed that he had a right to resort to forgery and other illegal acts in collecting a debt which he claimed that the corporation owed him, such belief does not deprive the forgery of its criminal character nor excuse its commission.
- An alleged authorization by the president of the corporation of such fraudulent forging and alteration of the receipts of the bank could not affect the character of the acts, because no such authority could be given.
- Where the treasurer of a corporation knowingly and designedly obtains money of the corporation, whose treasurer he is, by the use of forged receipts and other wrongful acts, this constitutes larceny under R. L. c. 208, § 28.
- It is no defence to an indictment for such acts of larceny that the treasurer in committing the acts was attempting to collect a claim that he had against the corporation, where it appears that the defendant's alleged claim was not created by any one authorized to bind the corporation, that it was designedly kept off the books of the corporation, that it was tainted with fraud in its origin and apparently was barred by the statute of limitations.
- In the same case it was *held* that, on evidence of an intent of the defendant to deprive the corporation permanently of its money, the defendant could be found guilty of larceny, although the motive that induced him to steal from his employer was a desire to accomplish the payment of a debt which he claimed to be due to him and although he believed that his conduct was justified by this purpose.
- In the same case it was *held* that it was proper on the cross-examination of the defendant to ask him, whether he intended to make the stenographer of the corporation believe that he was going to send the letter which he was dictating to her and which he afterwards destroyed, the answer called for being competent as tending to show that the defendant was acting with a fraudulent intent and not honestly.
- In the same case the exclusion of the testimony of the cashier of a certain bank, offered for the purpose of showing that the bank had held certain notes which were signed by the defendant and were indorsed by the president of the corporation, was *held* to have been proper, the notes not being produced in court and the witness stating that he did not know the signature of the president of the corporation.

INDICTMENT, found and returned in the Superior Court on October 6, 1917, charging the defendant with the crimes of forging certain instruments, each purporting to be "an accountable receipt for money," and with uttering such forged instruments as true and with the larceny of money, all in twenty-five counts, the substance of the crimes charged being stated in the opinion.

The defendant was tried before *Dana, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule and instruct the jury as follows:

"As to the counts on forgery:

"2. Criminal intent is not shown and a person is not guilty of the offence of forgery if he in good faith or in ignorance of the effect of his act makes or alters an instrument."

"5. Where one in ignorance or mistake as to fact commits an act which but for such mistake would be a crime there is an absence of malice and of criminal intention which is an essential element of the crime of forgery, and the general rule is that such ignorance or mistake of fact will exempt one from criminal responsibility, and if the jury are satisfied that the evidence discloses this situation they must acquit the defendant."

"7. If the jury are satisfied that the defendant did alter the various receipts introduced in evidence by the government, but under an honest belief that he had a right to do so, and had a right to act in the way in which he did under all of the circumstances that surrounded him as shown by the evidence, although he had in fact no such legal right, he cannot be found guilty of forgery and a verdict must be for the defendant.

"8. If the jury shall find upon the evidence in the case that the acts alleged in the various counts are as alleged in the various counts of the indictment, but that the defendant acted under the honest belief that he had a right to so act, although he may have been mistaken and that he did these acts for the purpose of procuring money which was actually his due, there can be no intent to defraud any one by the commission of these acts and he is not guilty of forgery.

"9. It is true as a proposition of law that no fraud is committed if a person gets no more than is actually due him, for no one has suffered or can suffer under those circumstances.

"10. If the jury shall find that the reason for the actions of the defendant in making the alterations of the receipts put in evidence by the government was the request of Mr. Atteaux that he should so procure his money which was due him from the corporation that the repayment of the money to him should not disclose facts to an expert bookkeeper, which would result in an investigation of the disposition of the moneys which had been paid to Atteaux for the purposes of the business by the defendant and that the bookkeeper had been thrown off his guard, it is not evidence of an intent to defraud, because the said bookkeeper could not in that way be put to any loss whatever by the acts

complained of, and if that were the reason and the jury should so find they cannot find the defendant guilty of forgery because of the lack of intent to defraud."

"As to the larceny counts:

"2. It is the duty of the jury to look into all of the circumstances surrounding the defendant and his acts and from that to form an opinion of the intention which actuated the defendant at the time of the taking of the moneys complained about, and however faultily a person may act against the law in other respects, yet if in the judgment of reason and charity he did not mean to steal, or if it is doubtful in the minds of the jury whether there was an intent, it is their duty to acquit him. *Commonwealth v. Robinson*, Thach. C. C. 230.

"3. It is perfectly true that if one was in error even in regard to his right to procure money for the payment of a debt due him, and he acted improperly in regard to the matter and in the manner of procuring it, still if he honestly thought he had a right to the money, it must exclude the idea of a felonious taking."

"6. That this defendant cannot be found guilty of larceny of the moneys complained of as having been taken in the indictment, if he took the money under the honest belief that he had a legal right to take it, although he might have been mistaken in that belief.

"7. Although it is necessary that the claim of right must be a *bona fide* one, yet whether the claim is made honestly is a question of fact for the jury and if the jury are in doubt they must acquit.

"8. Taking money with intent to appropriate it to the payment of a debt due from the party from whom it was taken may be unlawful, but if it is done with an honest belief in the legal right to do so, the taking does not constitute larceny and the jury must acquit.

"9. Even if the jury should find that the defendant used altered receipts for the purpose of making false and fraudulent representations in order to obtain money which he believed to be absolutely his due and which was his due, and by that means obtained no more than was rightfully due him from the corporation, he cannot be convicted of larceny, for no man can have a fraudulent intent when he obtains no more than is actually due him.

"10. Where one in ignorance or mistake as to facts commits an act which but for such mistake would be a crime there is an absence of the malice or criminal intention which is generally an essential element of the crime, and the general rule therefore is that such ignorance or mistake of facts will exempt the defendant from criminal responsibility and he must be acquitted if the jury shall find upon all the evidence that these elements existed."

"As to accountable receipts:

"1-8 (inclusive). . . . that the paper introduced in evidence in the attempted proof of the allegations in the . . . counts of the indictment is not an accountable receipt and the changing of the paper is not forgery and its delivery to any person would not be uttering.

"9. That if the jury shall find that in the procuring of the moneys in repayment to him in the manner in which it is disclosed they were procured, the fact that the bookkeeper, Miss Rodden, or the stenographer, Miss Ebbs, may incidentally have been deceived is not evidence of intent to defraud because neither one of the persons mentioned could in any way have been put to any loss whatever by the acts complained of either under the counts for forgery or for larceny, and if the defendant honestly believed that he had the authority to do the acts complained of and honestly believed that he had the right to procure the money and honestly believed that Mr. Atteaux had the right to agree with him that the money should be so repaid although he might have been mistaken as to the result of the situation he cannot be convicted."

The judge refused to make or give any of these rulings or instructions as requested, and gave other instructions to the jury, the essential parts of which are described in the opinion.

The jury returned a verdict of guilty; and the defendant excepted to the refusal of the judge to make or give the rulings or instructions requested and to certain portions of the charge raising the questions which are mentioned and disposed of in the opinion, and also excepted to the admission and exclusion of certain evidence as described in the opinion.

*E. R. Anderson*, (*H. Guild* with him,) for the defendant.

*A. C. Webber*, Assistant District Attorney, for the Commonwealth.

DE COURCY, J. The jury have found the defendant guilty on an indictment containing twenty-five counts, based upon nine separate transactions. The nineteenth count charges him with the larceny of \$2,200, and twenty-four counts are for forgery, uttering and larceny in relation to the other eight occurrences. The facts with reference to these last, as proved by the Commonwealth and admitted by the defendant in his testimony, are substantially these: Peakes was the treasurer of F. E. Atteaux and Company, Incorporated, a corporation organized in Massachusetts in 1914, to take over the business of a similar corporation organized in 1900 under the laws of New Jersey. The corporation (by which we refer to both the present concern and its predecessor) was a manufacturer and importer of dyestuffs and chemicals. The defendant, in the eight transactions referred to, obtained from the company's cashier a check signed in blank by her, telling her that he was going to the bank to buy exchange to send to a foreign customer, and that on learning what the exchange would cost he would fill in the check for that amount and return with a receipt. As matter of fact he filled in the checks for larger amounts, cashed them, and retained for himself the excess over what the exchange cost.

The defendant concealed his appropriation of his employer's money by many acts that were calculated to deceive the bookkeepers, auditors and others. The receipts which the bank gave him, showing payment of the foreign drafts he purchased, were raised by him to the amount for which he had filled in the corporation's checks, either by altering the figures on the bank's receipt, or by inserting items indicating that additional drafts had been purchased. In the alterations he simulated the handwriting and the ink of the originals. He dictated letters which were supposed to accompany the exchange drafts that he pretended to have bought, and then destroyed the letters, leaving copies on the files, but sending others in their place. He removed from the files acknowledgments received from the foreign creditors. And he caused fictitious invoices to be entered on the accounts of these creditors in the corporation's books, to avoid the appearance of overpayment. As to the nineteenth count for the larceny of \$2,200: After purchasing with the corporation's check two drafts for ten thousand francs each, he sent but one

(although the books and correspondence indicated that he sent both), sold the other to a trust company and appropriated the proceeds after deceiving the cashier.

The defendant testified substantially as follows: that in 1905, while he was treasurer, a shortage was discovered in certain accounts of the corporation, and that he was accused as the person responsible for it; that, although he did not in fact take any money, and was not permitted to examine the books to learn what the shortage represented, he agreed to pay to the corporation the sum of \$21,000; that thereupon he paid over money he had saved, conveyed his real estate and borrowed funds where-with to pay this sum, the last payment being made in 1909; that Atteaux, the president of the corporation, orally agreed that, if he (Peakes) would pay in this money and so prevent an investigation of the books, the corporation would repay him; that in 1914, after reminding Atteaux of this agreement and being told that what he should take to repay himself must not show on the books, he began to take these sums of money; that he had paid himself "somewhere about \$16,000," but had no memorandum of the amount and had destroyed his check books. He testified that he believed the corporation owed him the money; that he thought Atteaux, the president, had a right to agree that this money should be repaid to him; and that he only intended to carry out the arrangement made with Atteaux in repaying himself what he believed was due to him.

The principal contention of the defendant is that the presiding judge erred in the instructions he gave and in the refusal to give certain rulings requested on the issue of his criminal intent. Apparently his claim is, that if he took the money in payment of a debt which the corporation owed him and acted under an honest belief that he had a legal right to resort to the methods shown by the evidence, he could not be found guilty.

Plainly there was no error in charging the jury that the defence failed if there was no debt due to the defendant from the corporation. That was the very basis of his present claim of supposed right to appropriate the money.

Even assuming that the jury believed the unsupported and contradicted testimony of the defendant as to the alleged indebtedness of the corporation to him for the money he had paid



as restitution between 1905 and 1909, that would afford him no legal justification for the fraudulent alteration of the receipts for foreign drafts issued by the bank. The description of these receipts in the indictment as "an accountable receipt for money" seems appropriate, especially as copies of them were set forth in the specifications filed by the Commonwealth, which must be read in connection with the indictment. R. L. c. 218, § 39. *Commonwealth v. Howard*, 205 Mass. 128, 145. The false making or altering of such instruments would constitute forgery, within the definition of the statute. *Commonwealth v. Lawless*, 101 Mass. 32. *Commonwealth v. Boutwell*, 129 Mass. 124. R. L. c. 209, § 1. See R. L. c. 218, § 22. The "intent to injure or defraud," referred to in the statute establishing the penalty for forgery (R. L. c. 209, § 1) is a general intent to defraud any one. R. L. c. 218, § 30. *Commonwealth v. Costello*, 120 Mass. 358. *Commonwealth v. Segee*, 218 Mass. 501, 504. As to uttering see *Commonwealth v. Bond*, 188 Mass. 91.

The defendant admitted that in making the alterations in the receipts from the bank he intended to deceive the cashier and the auditor; the alterations and additions affected the liability of the bank by making it appear that it had obligated itself to transmit a larger sum in foreign money than it had contracted to do and had received a corresponding amount of current funds. R. L. c. 218, § 38. The inevitable effect of the defendant's acts, knowingly and designedly committed, was to "injure or defraud," and the inference of intent to defraud is necessarily drawn from those acts. His "belief" that he had a right to resort to forgery and other illegal acts in collecting a debt which he claimed the corporation owed him, does not deprive the forgery of its criminal character, nor excuse its commission. *Commonwealth v. Tenney*, 97 Mass. 50, 59. *Commonwealth v. Henry*, 118 Mass. 460.

Manifestly the alleged authorization by Atteaux would not purge the defendant's acts of their criminality. He could not as president or stockholder of F. E. Atteaux and Company, Incorporated, authorize the defendant fraudulently to forge or alter the receipts of the bank. See *England v. Dearborn*, 141 Mass. 590; *United States v. Taintor*, 11 Blatchf. C. C. 374.

What we have said with reference to the counts charging the defendant with forgery and uttering are largely applicable to

the defendant's contention under the larceny counts, that he acted under a claim of right and with an honest purpose. The statute provides that "Whoever steals, or, with intent to defraud, obtains by a false pretence, or whoever unlawfully and, with intent to steal or embezzle, converts or secretes with intent to convert, the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny. . . ." R. L. c. 208, § 26. The defendant knowingly and designedly obtained the money of the corporation, whose treasurer he was, by the use of forged receipts and other wrongful acts. The principle in *Commonwealth v. McDuffy*, 126 Mass. 467, on which he relies, goes no further than this: "that if the sole purpose of a false pretence is to procure from the person deceived the performance of a duty owed by that person to the prisoner, like the payment of a liquidated debt which is in fact due, there is no intention to defraud." *Commonwealth v. Burton*, 183 Mass. 461, 466. The McDuffy case is not applicable here, where the alleged debt was not created by any one authorized to bind the corporation, was designedly kept off its books, was tainted with fraud in its origin, and apparently was barred by the statute of limitations.

The charge of the presiding judge was more favorable than the defendant was entitled to in stating, "If the defendant did the acts here, which would otherwise constitute the crimes of forgery, or uttering a forged instrument, or larceny, if the defendant here in good faith honestly did the acts charged without any intent on his part to injure or defraud, then the defendant is entitled to an acquittal." The criminal intent involved in the charge was an intent to deprive the corporation permanently of its money. The defendant was guilty of larceny on the evidence, even though the motive which induced him to steal from his employer was the payment of a debt which he claimed to be due him, and even though he believed his conduct was justified. *Commonwealth v. Stebbins*, 8 Gray, 492. *Commonwealth v. Mason*, 105 Mass. 163. *Berry v. State*, 31 Ohio St. 219. *Fort v. State*, 82 Ala. 50. *The Queen v. Spurgeon*, 2 Cox C. C. 102. *Reg. v. Hall*, 3 Cox C. C. 245. *Reynolds v. United States*, 98 U. S. 145. *United States v. Anthony*, 11 Blatchf. C. C. 200.

The exceptions to the admission and exclusion of evidence may be disposed of briefly. The question to the defendant on cross-examination, whether he intended to make the stenographer believe he was going to send the letter that he dictated to her (and later destroyed) was competent as tending to show that he was acting with a fraudulent intent, and not honestly, as he claimed. The offer to prove, by the cashier of the Waltham National Bank, that the bank had held certain notes which were signed by the defendant and indorsed by F. E. Atteaux, was excluded rightly. The notes were not produced in court, and the witness stated that he did not know Atteaux's signature. The application for a fidelity bond, made by the defendant, and purporting to be signed by one Stuart, the vice president of the corporation, was offered for the purpose of contradicting the witness Atteaux. It is enough to say that the document was not signed by Atteaux.

The defendant has shown no error in the conduct of the case.

*Exceptions overruled.*

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EDITH E. POWERS, administratrix, vs. ATHERTON LORING.

Norfolk. December 4, 1918. — December 31, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence*, In use of highway, Causing death, Contributory. *Motor Vehicle*.  
*Evidence*, Presumptions and burden of proof.

Where one leading two horses on a much travelled highway at half past six o'clock on a pleasant but dark October evening was walking at the left of the horses and was himself on the right of the middle of the way, carrying no lantern, when he was struck and killed by a motor car approaching from behind and driven at the rate of twenty-five miles an hour, in an action for causing his death it cannot be ruled under St. 1914, c. 553, that he was negligent as matter of law.

In the action mentioned above it was treated as beyond question that there was evidence of negligence on the part of the driver of the car, who was the defendant's servant engaged in the defendant's business.

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate while in the exercise of due care by the negligence of the defendant's servant, the presumption created by St. 1914, c. 553, is commensurate with the degree of care required by law of the intestate in order that the plaintiff may recover damages.

TORT by the administratrix of the estate of Edward L. Powers, late of Cambridge, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate by running over him with a motor car driven negligently by a servant of the defendant acting within the scope of his authority on Washington Street in Weymouth near its junction with Main Street in that town at about half past six o'clock in the evening of October 12, 1916. Writ dated November 21, 1916.

The defendant's answer, besides a general denial, contained an allegation that the plaintiff's intestate was not in the exercise of due care.

In the Superior Court the case was tried before *Irwin, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked for certain rulings, among which were the following:

"1. On all the evidence the plaintiff cannot recover against this defendant."

"8. The presumption raised by St. 1914, c. 553, is not of itself sufficient to prove the due care of the plaintiff's intestate as required under the death statute."

The judge refused to make either of these rulings, but made the second ruling requested by the defendant, which was as follows:

"The plaintiff cannot recover unless Powers, the intestate, was actually and actually in the exercise of due care."

The jury returned a verdict for the plaintiff in the sum of \$4,500; and the defendant alleged exceptions.

*S. L. Whipple, W. R. Sears & H. W. Ogden*, for the defendant, submitted a brief.

*R. T. Healey, (A. D. Healey, of Washington, D. C., & J. B. O'Brien with him,)* for the plaintiff.

*Rugg, C. J.* There was testimony tending to show that at half after six o'clock on the evening of Columbus Day, 1916, while leading two horses on the right of the middle of a much travelled highway near the town of Weymouth, the plaintiff's intestate, walking on the left of the horses but still to his right of the middle of the way, was fatally injured by being struck by a motor car approaching from behind and driven in the same direction at the rate of about twenty-six miles an hour by an

agent of the defendant engaged in the business of the latter. The road in general was straight, with a slight bend near the place of the accident. The night was pleasant but dark. The deceased carried no lantern. The action is brought under R. L. c. 171, § 2, as amended by St. 1907, c. 375, to recover damages for causing this death.

It could not have been ruled as matter of law that the deceased was not in the exercise of due care and that the burden of proof of contributory negligence resting on the defendant under St. 1914, c. 553, § 1, had been sustained. Apart from the effect of that statute, there was evidence that the deceased was in the exercise of due care. *Emery v. Miller*, ante, 243. It cannot be ruled as matter of law that failure of a pedestrian upon a main highway to carry a lantern after dark, even though leading horses, is want of due care. Manifestly, in view of said c. 553, no such ruling could have been made. *Mercier v. Union Street Railway*, 230 Mass. 397. St. 1914, c. 182, relative to lights on vehicles has no pertinency.

It requires no discussion to demonstrate that it might have been found negligent on the part of one driving a motor car at night to overtake and run into a pedestrian travelling so far as appears continuously in a direct path on the right of a road, without veering to one side or the other.

The defendant's request for an instruction, to the effect that said c. 553 was not of itself sufficient to prove the due care required of the intestate under the death statute, was refused rightly under the circumstances here disclosed. Of course the statute is not proof in its technical sense. But it creates a presumption and a burden of proof. *Duggan v. Bay State Street Railway*, 230 Mass. 370. The case at bar is plainly distinguishable from *Pigeon v. Massachusetts Northeastern Street Railway*, 230 Mass. 392. The instruction given respecting the meaning of due care was not incorrect. The presumption created by the statute is commensurate with the degree of care required by the law of the deceased person, in order that there may be recovery. The statute is made applicable by its express terms both to civil and criminal actions for causing the death of a person. The presumption in such case is that the deceased was "in the exercise of due care." It is further provided that "contributory

negligence" on his part shall be an affirmative defence to be pleaded and proved by the defendant. Due care and contributory negligence thus are used as correlative terms in this connection.

The point whether the plaintiff could recover only in the event that the deceased was "actively and actually in the exercise of due care," is not raised on this record.

*Exceptions overruled.*

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MARGARET DEMPSEY vs. GOLDSTEIN BROTHERS AMUSEMENT COMPANY.

Hampden. October 14, 1918. — January 2, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Witness, Cross-examination to show bias. Evidence, Competency. Practice, Civil, Exceptions.*

In an action for personal injuries the defendant called a medical expert, who testified that he had examined the plaintiff and that she had not suffered any permanent injury. The plaintiff's counsel asked the witness, on cross-examination, "Who asked you, doctor, to examine this woman?" and the witness answered, "Mr. C, representing the Casualty Company of America, the manager." The defendant asked the judge to order this answer stricken out on the ground that it disclosed the insurance and was prejudicial to the defendant. The judge allowed the answer to stand but in his charge instructed the jury that, although the evidence was admitted properly, the jury were not to take into account the fact that the defendant was insured, that this was "of absolutely no consequence" and the jury were to disregard it. *Held*, that the admission of the evidence was proper for the single purpose of showing bias, and that with the instruction of the judge, which it must be assumed was followed by the jury, the defendant was not shown to have been prejudiced by the admission of the evidence thus properly restricted in its application.

In the same case it was *pointed out* that the part of the witness's answer which consisted of the name of the person who asked the doctor to examine the woman, without the explanation that he represented the insurance company, was competent for all purposes, but that the request of the defendant's counsel was that the judge should order the whole of the witness's answer to be stricken out without separating the competent part, so that the refusal of the request by the judge afforded no ground for exception.

TORT for personal injuries sustained on September 28, 1916, when the plaintiff was attending a theatrical performance in the

defendant's theatre at Westfield and, in walking along an aisle of the theatre, fell over a portable chair that had been left in the aisle negligently by the defendant's servants. Writ dated December 29, 1916.

In the Superior Court the case was tried before *Callahan, J.* Among the defendant's witnesses was Dr. Frederick D. Davis, who testified in regard to the plaintiff's injury as described in the opinion. On his cross-examination, the first question asked by the plaintiff's counsel was, "Who asked you to go to see this woman?" This question was objected to and a conference was had at the bench, in which the defendant argued that the answer to the question would disclose the fact that the defendant was insured against liability for injuries to persons attending such performances, and that the question was therefore inadmissible. At the conference above mentioned the defendant argued that the fact that the defendant was insured would, if made known to the jury, prejudice the jury, so that the jury would be more likely to return a verdict for the plaintiff than otherwise, and that the verdict, if for the plaintiff, would be likely to be larger than otherwise; while at the same time, owing to the financial condition of the insurance company, which was in the hands of a receiver, the defendant was not afforded real protection against liability; that the defendant was ready and willing to admit that the doctor examined Mrs. Dempsey at the request of the defendant and that the doctor was paid by the defendant for his examination, and that the only reason why the plaintiff could wish to insist on the question was to prejudice the jury by having the fact of such insurance disclosed. The counsel for the plaintiff stated he never had known that Dr. Davis represented an insurance company and did not know then what the doctor's answer would be. The plaintiff insisted upon the question and at the close of the conference the judge admitted the question, saying, "I shall not restrict the cross-examination. I will save your rights, if you wish." The question then was repeated in this form: "Who asked you, doctor, to examine this woman?" The doctor answered, "Mr. Chetworth, representing the Casualty Company of America, the manager." The defendant, by its counsel, then asked that the answer be stricken out. To this the judge replied, "I allow it to stand."

The defendant excepted. The direct examination had not disclosed whether the witness had attended the plaintiff as her own physician or as a representative of some other person.

In charging the jury, the judge adverted to the testimony admitted under objection and exception in the following words: "Some evidence was brought out in cross-examination concerning the connection of an insurance company with the defendant in this case. The evidence was properly admitted, because the answer called for was properly responsive to a proper inquiry made or addressed to the witness. But, gentlemen, you are not to take into account, in passing upon this case or upon any issue of it, the fact that the defendant was insured. That is of absolutely no consequence. It has no bearing whatever upon the elementary or fundamental questions here upon which the defendant's liability is determined. So that you will disregard the reference made to the fact that an insurance company was responsible for Dr. Davis's visit to the hospital, and will not let it influence you in any way."

The jury returned a verdict for the plaintiff in the sum of \$2,500, and the judge, after denying a motion for a new trial, reported the case for determination by this court, upon the question whether the evidence above described was admitted properly. If this evidence was admitted properly, the verdict was to stand. If the evidence was admitted improperly, the verdict was to be set aside and a new trial was to be had upon all questions.

The case was submitted on briefs.

*W. H. McClintock, E. A. McClintock & D. B. Hoar*, for the defendant.

*R. J. Morrissey & J. L. Gray*, for the plaintiff.

**BRLEY, J.** A medical expert called by the defendant who had made a physical examination of the plaintiff at the hospital having testified that she had not suffered any permanent injury, the question put in cross-examination, "Who asked you, doctor, to examine this woman?" was relevant, and the answer, "Mr. Chetworth, representing the Casualty Company of America, the manager," was responsive. But before the question was asked, the counsel for the plaintiff, during a conference by the parties with the presiding judge, had been informed that the defendant



held a policy of indemnity insurance, and, upon the disclosure shown by the answer, the defendant's counsel moved that it be stricken out on the ground previously stated to the judge that, if the fact of insurance were admitted, the defendant might be prejudiced on the question of liability or in the assessment of damages.

It is settled that evidence that the defendant was insured against accidents could not have been introduced as an admission of negligence. *Anderson v. Duckworth*, 162 Mass. 251. *Perkins v. Rice*, 187 Mass. 28. *Sibley v. Nason*, 196 Mass. 125. But the answer under discussion is not in the nature of an admission. Nor was it received in evidence as such. While the witness does not appear to have been an officer, agent or servant of the defendant corporation, he had been called and had given evidence in its behalf, and, if the jury accepted his opinion, the measure of the plaintiff's damages would be materially affected. It was competent for the plaintiff to show, if she could, that he was not disinterested, and ordinarily the fact that he had been employed and paid by adversary interests to make the examination would be admissible. *Mayhew v. Thayer*, 8 Gray, 172, 177. In *Stevens v. Stewart-Warner Speedometer Corp.* 223 Mass. 44, the question excluded on cross-examination was, "Who were you working for?" and the opinion holds, that the answer which counsel expected, "The Federal Insurance Company who insured the car against theft," should have been admitted as tending to affect the weight to be given to the testimony of the witness upon his direct examination. It is true the action in that case was brought for the benefit of the insurance company which had indemnified the owner. A defendant, however, who is insured can properly call a witness even if as the paid employee of the insurance company he has prepared the case for trial, and who may give evidence of alleged admissions obtained by him in conversation with the plaintiff, which, if believed by the jury, would exonerate the defendant from all liability. If his employment cannot be shown because the answer would reveal that the defendant had a policy of indemnity insurance, an exception is created to the universal rule, that the pecuniary interest of a witness or his prejudice or bias in favor of the party calling him can always be shown, limited only as to the extent of the in-

quiry by the sound discretion of the trial judge. *Jennings v. Rooney*, 183 Mass. 577, 579. The test of admissibility in *Stevens v. Stewart-Warner Speedometer Corp.*, just cited, as in the case at bar, is the question of the possible partiality of the witness, to which the judge's ruling denying the request to strike out is limited by the report.

If no further action had been taken, the defendant could urge that the jury might give the answer a broader scope and meaning than the ruling permitted. The judge, however, in instructions to which no exceptions were taken explained his reasons for admitting the answer, and told the jury in clear and positive words, that they were "not to take into account, in passing upon this case or upon any issue of it, the fact that the defendant was insured. That is absolutely of no consequence. It has no bearing whatever upon the elementary or fundamental questions here upon which the defendant's liability is determined. So that you will disregard the reference made to the fact that an insurance company was responsible for Dr. Davis's visit to the hospital, and will not let it influence you in any way." It must be assumed that the jury followed the instructions. *Ducharme v. Holyoke Street Railway*, 203 Mass. 384, 392, and cases cited.

The ruling requested is also inapplicable to so much of the answer as is shown by the words "Mr. Chetworth," and the refusal of a ruling which is in part correct and in part is erroneous, where the counsel does not ask for a separate ruling on the correct part, affords no ground of exception. *Gardiner v. Brookline*, 181 Mass. 162. *Smith v. Duncan*, 181 Mass. 435. *Commonwealth v. Anderson*, 220 Mass. 142, 145.

A majority of the court are of opinion that, the defendant having failed to show error, the exceptions should be overruled and judgment entered for the plaintiff on the verdict.

*So ordered.*

ALCID A. BARABE vs. DUHRKOP OVEN COMPANY.

EMILE BARABE vs. SAME.

Bristol. October 28, 1918. — January 2, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Negligence, In installing oven. Actionable Tort. Sale, Conditional.*

If a manufacturer of ovens installs an oven in a bakery under a contract in writing of conditional sale made with the baker, whereby the manufacturer is to retain the title to the oven until the full amount of the purchase price has been paid, and if four months later, before the full price has been paid, while the oven is being operated at the requisite temperature for baking bread, a fire bursts through the bricks by which the oven is installed because the interstices have not been filled sufficiently with mortar, whereby the stock in trade and fixtures of the baker are injured and destroyed, in an action of tort for negligence brought by the baker against the manufacturer of ovens, the plaintiff is entitled to go to the jury.

In the action above described it appeared that, when the oven was installed, there was a truss-beam directly over and in contact with the masonry of the arch at the top of the oven, and it was held that, although the defendant was under no obligation to remove the truss-beam, yet, with the truss-beam there, the defendant was bound to use reasonable care to install the oven in such a way that it could be operated safely, and, if the defendant's faulty performance of the work caused the fire, it was liable in damages, even if the exact form in which injury to the plaintiff might result was not foreseen.

If a manufacturer of ovens installs in the part of a building used by a tenant operating a bakery a baker's oven which the manufacturer annexes to the building, retaining the title to the oven under a contract of conditional sale made with the tenant, and the manufacturer does the work of installation so negligently that when the oven is used the building is set on fire and injured, the owner of the building has a right of action against the manufacturer to recover damages for the natural consequences of the manufacturer's negligence, although there was no contractual relation between the owner and the manufacturer, who when he installed the oven did not know who owned the building.

TWO ACTIONS OF TORT, both against a corporation engaged in the business of manufacturing, selling and installing ovens, the first by a baker carrying on his business at the building numbered 643 on South First Street in New Bedford, and the second by the owner of that building, who was the mother of the plaintiff in the first action, for negligence of the defendant's

agents and servants in constructing and installing a baker's oven, under the terms of a contract of conditional sale, in the building mentioned so carelessly that the building was set on fire, whereby the stock in trade and fixtures of the plaintiff in the first case were damaged and destroyed and the building of the plaintiff in the second case was damaged. Writs dated December 8, 1915.

In the Superior Court the cases were tried together before *Raymond, J.* The evidence is described in the opinion. At the close of the evidence the defendant filed a motion in each case asking the judge to rule that the plaintiff could not recover and to order a verdict for the defendant. The judge denied these motions and submitted the case to the jury in a charge which included the following instruction: "The truss-beam being there, the question for the jury is whether they treated the situation in a reasonably careful manner, no duty resting on the defendant to take away the truss-beam, but, the truss-beam being there, the floor being there, did they do what reasonably careful men would do, treating that situation that actually existed? If they did, they were not negligent. If they did not, they were negligent."

The jury returned a verdict for the plaintiff in each case, in the first case in the sum of \$1,700 and in the second case in the sum of \$800. The defendant alleged exceptions to the refusal to order verdicts for it and to the instruction quoted above.

*S. W. C. Downey, (C. T. Cottrell with him,)* for the defendant.  
*J. P. Doran,* for the plaintiffs.

*BRALEY, J.* The exceptions to the instructions are not well taken, and the presiding judge rightly submitted to the jury the question of the defendant's liability. It manufactured and installed for the plaintiff Alcid A. Barabe one of its patent baking ovens in accordance with the terms of a conditional contract, under which title did not pass to the vendee upon completion and installation but was to be transferred by a bill of sale when the contract price had been fully paid. The plaintiff, who never has acquired title, used the oven in his bakery, and within four months from the date of the contract and while it was being operated at the requisite temperature for baking bread, fire broke out between the top of the oven and the ceiling, which the jury would have been warranted in finding was caused solely by the

defendant's negligent workmanship. The defendant had bound itself to furnish an oven which was not defective when subjected to the conditions of operation shown by the contract. And the jury were correctly instructed that, while the defendant was under no obligation to remove the truss-beam directly over and in contact with the masonry of the arch at the top of the oven to which, as the jury could find, the fire bursting through the bricks was communicated because the interstices had not been sufficiently filled with mortar, it was required to use reasonable care to protect the truss-beam from combustion. If the company's faulty performance of the work caused the fire, it is liable in damages even if the exact form in which injury to the plaintiff might result was not foreseen. *Hill v. Winsor*, 118 Mass. 251. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 231. *D'Almeida v. Boston & Maine Railroad*, 209 Mass. 81, 88.

The plaintiff in the second case is the mother of Alcid, and, when the oven was built and when the fire occurred, she was the owner of the "real estate" occupied by her son for the purposes of his business. It is contended that the verdict assessing damages for the injury to the buildings should be set aside because the fact of her ownership was unknown to the defendant and no contractual relations existed between them. The defendant, even if the contractee used that part of the premises where the oven had been placed, owed to the plaintiff as the landowner the duty of not causing injury to her property by its tortious acts or misfeasance. It was uncontroverted that it had annexed to the premises an oven to which it retained title under a contract, the performance of which by the conditional vendee until he acquired the ownership recognized the maintenance and use of the oven as previously stated. If the jury found that, when so used and because of insufficient construction, it became a dangerous instrumentality which would be likely to set the plaintiff's building on fire, the defendant is liable in damages. *Derry v. Flitner*, 118 Mass. 131, 134. *Gorham v. Gross*, 125 Mass. 232, 240. *Bickford v. Richards*, 154 Mass. 163, 164. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 231. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 832. The cases of *Lebourdais v. Vitriified Wheel Co.* 194 Mass. 341, 343, and *Leavitt v. Fiberloid Co.* 196 Mass. 440, which hold that where the article or instrumentality is not of

itself inherently dangerous, "a vendor who makes no representation is not liable to a remote purchaser of the article sold, for damage done by defects in it," are manifestly distinguishable. *Glynn v. Central Railroad*, 175 Mass. 510, 512.

The exceptions in each case must be overruled.

*So ordered.*

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### THOMAS COURTNEY'S CASE.

Worcester. November 11, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Workmen's Compensation Act*, Agreement in regard to compensation, Procedure. Agency, Scope of authority.

Where under the workmen's compensation act an injured employee and the insurer of his employer have reached an agreement in regard to the employee's compensation for his injury and have signed such agreement, the employee has no right to present his claim on the agreement before the Industrial Accident Board under St. 1911, c. 751, Part III, § 5, as amended by St. 1917, c. 297, § 2, unless the agreement was filed with the Industrial Accident Board and approved by the board as required by St. 1912, c. 571, § 9.

In a claim under the workmen's compensation act this court found it unnecessary to consider whether the evidence justified a finding that the superintendent of the employer acted as the authorized agent of the insurer, and, if he did, whether he had authority to make and sign in behalf of the insurer an agreement with the employee as to compensation for his injury after the six months had expired during which by St. 1911, c. 751, Part II, § 15, as modified by St. 1912, c. 571, § 5, the employee was required to file his claim for compensation in the absence of mistake or other reasonable cause of his failure to do so.

APPEAL to the Superior Court under the workmen's compensation act from a decision of the Industrial Accident Board ordering the insurer to pay to Thomas Courtney, an employee of the Worcester Gas Light Company, a weekly compensation of \$10 from July 20, 1917, the date upon which the insurer last paid compensation under the agreement mentioned in the opinion, to October 3, 1917, the date upon which the employee resumed his employment, and also to pay to such employee a weekly compensation of \$2 from October 3, 1917, to January 24, 1918, for partial incapacity, such last named compensation to be continued

in accordance with the requirements of the act, the total amount of compensation to January 24, 1918, being \$139.43.

In the Superior Court the case was heard by *O'Connell, J.* The facts which appeared by the report of the Industrial Accident Board are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

St. 1911, c. 751, Part III, § 5, as amended by St. 1917, c. 297, § 2, is as follows: "If the association and the injured employee fail to reach an agreement in regard to compensation under this act, or if they have reached such an agreement, which has been signed and filed in accordance with the provisions of this act, and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the Industrial Accident Board which shall thereupon assign the case for hearing by a member of the board."

St. 1912, c. 571, § 9, is as follows: "Section four of Part III of said chapter seven hundred and fifty-one is hereby amended . . . so as to read as follows: — Section 4. If the association and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the Industrial Accident Board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

The case was submitted on briefs.

*A. H. Bullock & J. M. Thayer*, for the insurer.

*J. H. Reid*, for the employee.

LORING, J. On November 25, 1916, Courtney met with an accident in the course of and arising out of his employment by the Worcester Gas Light Company. On June 13, 1917, he retained counsel and on July 20, 1917, that is, at the end of thirty-four weeks after the accident, he was paid \$320 by the superintendent of the gas light company and signed an agreement for compensation which is not set forth in the record. On August 28, 1917, the insurance company notified the superintendent to discontinue further payments and no further payments have been

made. On September 28, 1917, the employee "at the suggestion of the Industrial Accident Board" filed a claim for compensation. On October 3, 1917, he was given light work by the gas light company and is still in their employ.

The board found that the employee had reasonable cause for failure to file his claim before September 28, 1917, because the insurer through the superintendent of the gas light company, "its authorized agent . . . had entered into an agreement in regard to compensation." They also found that the insurance company had declined to make any payments after July 20, 1917, notwithstanding the provisions of Part II, § 4, as amended by St. 1916, c. 90. The award ended with a finding that the employee was entitled to \$10 a week from July 20, 1917, to October 3, 1917, and to \$2 a week from October 3, 1917, to January 24, 1918, amounting in all to \$139.43. Upon this award the Superior Court made a decree that the insurer pay the employee \$139.43 and continue payment of \$2 a week "in accordance with the requirements of the act."

The employee in this court put his case on the ground that there was evidence justifying the finding that the superintendent of the gas light company was authorized to make the agreement of July 20, 1917, in behalf of the insurance company and "that the filing of the claim for the compensation on September 28, 1918, has no bearing on the case. It was filed at the suggestion of the Industrial Accident Board, the insurer having requested a hearing. The right to compensation had been concluded previous to this time by the signing of the agreements and receipt, and the giving and acceptance of \$320." That is to say, in this court the employee has elected to proceed under the latter part of Part III, § 5, as amended by St. 1917, c. 297, § 2. But the plaintiff cannot proceed under that provision of the act because the agreement of July 20, 1917, has not been filed with and approved by the Industrial Accident Board in accordance with the provisions of St. 1912, c. 571, § 9.

Under these circumstances it is not necessary to determine whether the evidence justifies the finding that the superintendent of the gas light company was the authorized agent of the insurance company and, if he was, whether he had authority to make this agreement after the six months had expired during which the



employee was bound to bring his complaint in the absence of mistake or other reasonable cause as required by Part II, § 15, as modified by St. 1912, c. 571, § 5.

*Decree reversed.*

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GORDON A. JOHNSTONE vs. JOHN COCHRANE & others.

Middlesex. November 11, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Practice, Civil, Exceptions, Parties. Agency, Commissions. Broker.*

In an action where a verdict had been ordered for the defendants and the plaintiff had alleged exceptions, it appeared by the record that certain evidence of the plaintiff had been admitted by the judge subject to the defendants' exceptions, and it was contended by the defendants before this court, that the evidence thus admitted was incompetent and should not be considered by this court in determining the case upon the plaintiff's evidence, but it was *held* that it was not necessary to pass upon this question or upon the competency of the evidence thus admitted, because the jury were warranted in finding for the plaintiff against one of the joint defendants without considering the evidence in question.

In an action for a commission for procuring the sale of the property of a manufacturing corporation, of which the defendants were the controlling stockholders, where it appears that the plaintiff procured a purchaser who bought the property in question for \$250,000, of which \$160,000 was paid in cash and the remaining \$90,000 in preferred stock of a new corporation, testimony of the plaintiff on his cross-examination, that, "The plaintiff always held it and offered it at \$250,000 and understood it was to be \$250,000 cash, 'the best we could get for it,'" does not show that the plaintiff's authority was limited to a sale for \$250,000 in cash and the last clause of the sentence contradicts that contention.

In the action above described, after contradictory evidence in regard to the negotiations, the principal defendant testified that, "From that time on he [the plaintiff] had the negotiations for the sale of the plant personally with Mr. S [the representative of the purchaser] and the interests that he represented who finally purchased." *Held*, that the jury were warranted in finding that this statement of the defendant was true and entitled the plaintiff to go to the jury.

In the same case it also was *held* that the fact, that the property for which the plaintiff procured a purchaser belonged to a corporation, of which all the stock was owned by the principal defendant, his sister and his father, did not necessarily make the employment of the plaintiff to procure a sale of the property an employment by the corporation, there being evidence that the principal defendant personally employed the plaintiff to find a purchaser for the property.

The well established principle here was followed, that a broker earns a commission when he brings the property which he is employed to sell to the attention of a third person and then turns that person over to his employer and the property is sold to such third person as the result of the negotiations begun with him by the broker.

In the case above described the second defendant was the sister of the principal defendant and was one of the three holders of all the stock of the corporation, but there was no evidence that she employed the plaintiff or that the principal defendant was authorized to employ him in her behalf, and it was *held* that a verdict should be ordered in her favor, the fact that she derived benefit from her brother's employment of the plaintiff being no evidence of her liability.

The action above described, after the death of a third defendant, was prosecuted against the principal defendant and his sister jointly, and the evidence showed a right of action against the principal defendant alone. The principal defendant contended that no recovery could be had against him severally; but it was *held* that by R. L. c. 177, § 6, such recovery against one of two or more defendants in an action of contract is authorized "although it is found that all the defendants are not jointly liable."

CONTRACT against John Cochrane, Pauline Cochrane and J. Eugene Cochrane for \$11,867.41 upon an account annexed as follows:

"July 1, 1912, to commission at five per cent on sale price of \$250,000 of real and personal property of the Danielsonville Cotton Company at Killingly, Connecticut \$12,500.00

"Credit by money advanced to cover expenses of travelling, advertising, etc.

632.59

\$11,867.41"

Writ dated January 14, 1916.

Later a suggestion was filed stating the death of the defendant John Cochrane on February 13, 1916, and on March 16, 1917, by agreement of counsel in open court the plaintiff discontinued his action against the defendant John Cochrane without costs.

In the Superior Court the case was tried against the other two defendants before *J. F. Brown, J.* The plaintiff's evidence is described in the opinion. At the close of the plaintiff's evidence the judge, upon motion of each of the defendants, made the following rulings:

"1. That the plaintiff has not made out a case against this defendant.

"2. That upon all the evidence submitted by the plaintiff the jury would not be warranted in finding a verdict against the defendant.

"3. That it appears, upon the plaintiff's own testimony, that whatever the defendant did in the way of sale of the corporation property was done in behalf either of the Danielsonville Cotton Company or the Cochrane Manufacturing Company, and not in his individual capacity.

"4. That the plaintiff has submitted no evidence whatever which would warrant a finding against this defendant.

"5. That there is no evidence that in anything that J. Eugene Cochrane did he was acting as agent for his intestate.

"6. That upon the evidence the sale on which the plaintiff claims a commission was on materially different terms from those on which plaintiff claims he was authorized to arrange for sale."

The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

At the trial certain evidence of the plaintiff was admitted by the judge subject to the defendants' exception, and it was contended by the defendants in this court that this evidence was incompetent and should not be considered by this court in determining the case on the plaintiff's evidence, although the defendants, a verdict having been ordered in their favor, filed no bill of exceptions.

R. L. c. 177, § 6, is as follows: "In an action against two or more defendants upon a contract express or implied, the plaintiff shall be entitled to judgment against such defendants as are defaulted and against those who upon trial are found liable, although it is found that all the defendants are not jointly liable."

*G. C. Richards*, (*A. R. Pike* with him,) for the plaintiff.

*F. G. Katzmann*, (*J. P. Vahey & J. R. McCool* with him,) for the defendants.

LORING, J. This is an action to recover a commission for the sale of the property (with an exception which need not be stated) of the Danielsonville Cotton Company. The defendants were John, Pauline and J. Eugene Cochrane. It appeared at the trial that John died after this action was brought. On the evidence introduced at the trial the presiding judge directed the jury to return a verdict for the other two defendants and the case is here on an exception to that ruling and upon an exception to the admission of certain evidence introduced against the objection of the defendants.

We do not find it necessary to pass upon the question of evidence, for we are of opinion that, laying that evidence on one side, the jury were warranted in finding for the plaintiff as against the defendant Eugene. At another trial it is not likely that the evidence admitted under the defendants' exception will be presented in the same form.

There was a great deal of confusion in the evidence on many of the details of the transaction here in question. We do not find it necessary to go into or state these details at length. The jury were warranted in finding the following to be the facts of the case: The plaintiff was the agent in charge of the Danielsonville Cotton Company situate at Danielson in Connecticut. The original defendants were the owners of all the corporate stock of that company. In April, 1911, the defendant Eugene asked the plaintiff to find a purchaser for the property and agreed to pay him the usual broker's commission if he was successful in so doing. A year later the plaintiff brought the property to the attention of Frank Bulkeley Smith. Smith came to Danielson and made a thorough inspection of it. At the conclusion of his inspection he asked the plaintiff to put him in communication with his (the plaintiff's) principal. Thereupon the plaintiff arranged for a meeting between Smith and Eugene. This meeting took place at the Worcester Club on the evening of the day on which the request was made, namely, April 2, 1912. Negotiations for the sale of the property were begun between Eugene and Smith at that meeting. Later on Smith introduced Eugene to his principals Kidder, Peabody and Company, and the negotiations begun between Eugene and Smith were carried on between Eugene, Smith and Kidder, Peabody and Company until the latter part of May or the early part of June when Kidder, Peabody and Company agreed to buy the property for \$250,000, \$160,000 to be paid in cash and \$90,000 to be paid in the second preferred stock of the Danielson Cotton Company of Massachusetts, a corporation organized by Kidder, Peabody and Company to take title to and operate the mill. The conveyance to the new corporation was made on June 26, 1912. The \$160,000 in cash was paid to the old corporation by Kidder, Peabody and Company, and the old corporation paid it to Marshall Field and Company in payment of its debt to that firm;

the \$90,000 second preferred stock was distributed to and among Pauline, Eugene and the personal representatives of John Cochrane as the owners of the stock of the old corporation.

The defendants' first contention is that by the terms of the plaintiff's employment by Eugene the plaintiff was to be paid a commission only if he procured a sale for \$250,000 in cash, and the sale which was made was for \$160,000 in cash and \$90,000 in the second preferred stock. There is nothing in the evidence which even gives color to this contention. The evidence showed that Eugene employed the plaintiff to find a purchaser for the property and agreed at the time to pay him the usual commission. At that time he told the plaintiff that he intended to ask \$300,000 for the property and the plaintiff told him that that price would be prohibitive. Thereupon Eugene asked the plaintiff what he thought the property could be sold for and the plaintiff told him "Possibly \$250,000 would be the maximum that could be got for the property." Later on, while the negotiations with Smith were going forward, Eugene suggested to the plaintiff that the price should be changed to \$200,000 and the plaintiff then told Eugene that if the property could be sold for \$200,000 it could be sold for \$250,000. The defendants' main contention in this regard is founded upon an answer of the plaintiff made during his cross-examination. But in quoting the answer the defendants' counsel has omitted the last seven words. The record states that on cross-examination the plaintiff testified: "The plaintiff always held it and offered it at \$250,000 and understood it was to be \$250,000 cash, 'the best we could get for it.'" Even without the last seven words there is nothing in this testimony which supports the defendants' contention and the last seven words negative it.

The defendants' second contention is founded upon a statement made by Eugene in his direct examination. In his direct examination Eugene testified that he "saw Mr. Winsor [of Kidder, Peabody and Company] at his house about six weeks after the Union Club conference. There had been a complete break in the negotiations; they started all over again. He saw Mr. Smith again at Kidder Peabody's about the first of June." The "Union Club conference" was a meeting between Smith and Eugene at the Union Club in Boston about two weeks after the

first meeting at the Worcester Club on the evening of April 2. In the first place the jury were not bound to believe this testimony. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314. In the second place it was directly contradicted by Eugene himself in another part of his testimony. After stating that he met Smith at the Worcester Club on April 2, 1912, Eugene testified that: "From that time on he had the negotiations for the sale of the plant personally with Mr. Smith and the interests that he represented who finally purchased." Apart from this testimony of Eugene it is apparent from the details of Smith's visits to the plant and the conferences that took place which are set forth in detail in the testimony but which we have not found it necessary to refer to at length, that the jury were warranted in finding that the last statement of Eugene set forth above was the fact. Under these circumstances it is not necessary to consider what the result would have been as matter of law had it been the fact that there had been "a complete break in the negotiations."

The defendants' next contention is that, if there was any contract with the plaintiff, it was a corporate one made between the plaintiff and the old corporation the Danielsonville Cotton Company. The fact that the property to be sold was owned by the corporation and not by Eugene does not of necessity make the employment of the plaintiff to procure a sale of the property an employment by the corporation. A person who does not own property may, if he chooses, employ a broker to get a purchaser for it. The fact that he does not own the property is a circumstance bearing upon the question whether he did in fact employ the broker to find a purchaser for the property. But this is the only bearing which that fact has. The matter was discussed at length in *Monk v. Parker*, 180 Mass. 246, and what was said there need not be repeated here. It appeared in the evidence at the trial that the former corporation (the capital stock of which was owned by Eugene, his sister and his father) had become indebted in a large amount to Marshall Field and Company, and that the occasion of Eugene employing the plaintiff to find a purchaser for the property was because Marshall Field and Company were pressing for the payment of this debt. In the end the whole of the \$160,000 paid in cash by Kidder, Pea-

body and Company, had to be and was applied by the old corporation in the payment of this debt to Marshall Field and Company. Under these circumstances there was nothing significant much less conclusive in the fact that the property for which Eugene asked the plaintiff to find a purchaser was owned by the corporation and not by him. The defendants have urged in this connection that the paper on which Eugene wrote to the plaintiff when he did write him, was corporate paper. It was corporate paper. But it was not the corporate paper of the Danielsonville Cotton Company. It was the corporate paper of the Cochrane Manufacturing Company, another corporation which it appeared in evidence was owned by the same persons who owned the Danielsonville Cotton Company. And it is the fact that every letter written to the plaintiff was signed by Eugene personally and never as an officer of either corporation.

The last fact relied upon by the defendants in this action is that on cross-examination the plaintiff was asked this question, "You were instructed by Mr. Cochrane, in his capacity of treasurer and manager of this Danielsonville Cotton Company, to show the plant to anybody who came down there to see it, after you first learned from any source that they were going to run the plant's stock out, close it up and sell it?" and that the plaintiff answered, "No I didn't have such instructions. I had instructions to show Mr. Nicholson, and he was to send his customers with a card of identification so as to know it was his customer and not a customer of some other broker." The defendants' contention based upon this question and answer is that, "the failure of the plaintiff as indicated above to repudiate the notion that he was dealing with Mr. J. Eugene Cochrane in his official capacity shows pretty strongly that what we are contending for is true." There is nothing in this suggestion.

It is settled by many decisions (and among them *Desmond v. Stebbins*, 140 Mass. 339, and *Willard v. Wright*, 203 Mass. 406) that a broker earns a commission where he brings the property which he is employed to sell to the attention of a third person and then turns that person over to his employer and the property is sold as the result of negotiations so begun between the two.

We are of opinion that the plaintiff made out a case against the defendant J. Eugene Cochrane.

We are however of opinion that the plaintiff did not make out a case against the defendant Pauline Cochrane, the other defendant left after the action had abated as against John Cochrane by his death. There was no evidence that Pauline authorized Eugene to employ the plaintiff as a broker in her behalf. Nor was there any evidence that Eugene undertook to employ him in behalf of Pauline. The fact that she derived benefit under Eugene's employment of the plaintiff does not make her liable. So far as the defendant Pauline is concerned the ruling directing a verdict for the defendants was right.

The defendant Eugene Cochrane has insisted that the ruling directing a verdict for him was right, even if he would have been liable had he been the sole defendant. This contention is based on the ground that the action here in question was brought against Pauline and him jointly and the case made out in the evidence was a case against him alone. He relies in this contention upon *Tuttle v. Cooper*, 10 Pick. 281. But soon after the decision of this court in that case "the Legislature passed a statute, which, with occasional modifications, has since continued in force, authorizing the plaintiff in an action of contract against two or more defendants, to take judgment against those, though less than all sued, who should appear upon the trial to be liable." That statute is now R. L. c. 177, § 6. The cases of *Leonard v. Robbins*, 13 Allen, 217, *Monk v. Parker*, 180 Mass. 246, are cases where this statute was applied.

The result is that the exceptions to the ruling must be overruled so far as the defendant Pauline Cochrane is concerned and sustained so far as the defendant J. Eugene Cochrane is concerned.

*So ordered.*



## MORRIS LONDON vs. BAY STATE STREET RAILWAY COMPANY.

Plymouth. November 13, 14, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, &amp; CARROLL, JJ.

*Practice, Civil*, Argument of counsel, Conduct of trial, Judge's charge, Exceptions: curing error. *Negligence*, Rules of defendant corporation. *Evidence*, Competency, Failure to call witness, Presumptions and burden of proof.

In an action against a street railway corporation for personal injuries sustained by a collision, with a motor truck, of an open electric car of the defendant, on the running board of which the plaintiff was being transported as a passenger, it is improper for the plaintiff's counsel in his closing argument to the jury to ask the jury whether they expect to be treated, when they go on cars of the defendant's line, the way that the plaintiff was treated by the defendant, to tell them that they are making the law for the county in which the case is being tried, that the defendant is a corporation having the power to take their land by right of eminent domain on which to lay its tracks and that in consideration of those privileges it is charged with certain duties toward its passengers.

In the case above described the defendant's counsel in an intermission in the plaintiff's closing argument excepted to the statements of the plaintiff's counsel above described and asked the presiding judge to instruct the jury to disregard them. In his charge to the jury the judge said, "During the argument of the counsel for the plaintiff he made certain statements to which the counsel for the defendant rose and objected. One was with reference to the right of the railway company to take your land by eminent domain; the other was with respect to your making law in these cases for Plymouth County. It is sufficient to say, perhaps, as to both of those that neither statement has any bearing on any issue that you are trying." *Held*, that the impropriety of the argument of the plaintiff's counsel, to which the defendant excepted, was not merely that the statements of the counsel were wrong, which they were, but that the use of them was an appeal to the jury to act in violation of their duty as jurors, and that the instruction of the judge was not an instruction, as it should have been, to disregard this improper argument, so that the judge's charge did not cure the error and the defendant's exception must be sustained.

In the same case it was *held* that the defendant's counsel, by taking an exception to the improper portion of the argument and asking the judge to instruct the jury to disregard it, had saved the defendant's right to have its exception sustained unless the judge cured the error that had been committed, which he did not do.

In an action against a street railway corporation for personal injuries sustained by reason of a collision, when the plaintiff was a passenger on a car of the defendant, the plaintiff was allowed to introduce in evidence certain rules of the defendant, but there was no evidence of any violation of any of these rules. The judge instructed the jury as follows: "If you find they did not violate

any of the rules, of course the rules are of no consequence in this case. If you find that they did violate one or more of them and such disobedience contributed to the accident, that would be evidence tending to show negligence, for which the defendant is liable." *Held*, that the rules in question should not have been admitted in evidence, and that it was error for the judge to deal with them as he did in his charge.

In the case above described the defendant's conductor, who at the time of the accident was in charge of the car in question, at a former trial of the case had been called and examined as a witness by the plaintiff and also had been called and examined by the defendant. At the later trial he was in court but neither the plaintiff nor the defendant called him as a witness. The defendant asked the presiding judge to instruct the jury that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident." The judge refused to give this instruction. *Held*, that the instruction requested by the defendant should have been given.

TORT, against the Bay State Street Railway Company, for personal injuries sustained by the plaintiff on the afternoon of September 13, 1913, when he was travelling as a passenger on the running board of an open car of the defendant on Main Street in the town of Randolph and the car came into collision with a motor truck owned by the Hazen-Brown Company. Writ dated August 1, 1914.

In the Superior Court the case was tried before *Sisk, J.* The jury returned a verdict for the plaintiff in the sum of \$5,000; and the defendant alleged exceptions, which are described in the opinion, including those relating to the closing argument of the counsel then in charge of the plaintiff's case.

The following rules of the defendant, which are referred to in the opinion, were offered in evidence by the plaintiff together with other rules and were admitted by the judge, subject to the defendant's exception:

"Rule 19. Charge of Car. The Conductor has charge of the car; the Motorman is under his direction and will obey his orders so far as reasonable and consistent with the rules. The Motorman is directly responsible for the handling and condition of the equipment. Neither Conductor nor Motorman shall leave the car before reaching its destination, except in emergency, and must then notify the other of such intended action and give reason for so doing. Misapplication of this rule will lead to immediate dismissal. Both Conductor and Motorman must remain on car while

on duty whether 'laying off' or not. Under no circumstances shall both Conductor and Motorman be away from the car at the same time unless properly relieved; in the absence of the Conductor the Motorman is held responsible for the car and its management and must notify the Conductor of the number of passengers who may have entered in his absence."

"Rule 45. Caution — Street Obstruction. Motormen must seasonably notify conductors in approaching any temporary obstruction such as the wooden horses, barrels, iron bars, lanterns, etc., used in protecting street work, vehicles disabled close to track, etc., which are dangerous to passengers on running board. Conductors must warn passengers in a manner which they will understand of all such obstructions as well as any permanent dangers, such as draw-bridges, trees, etc."

"Rule 158. Whistles. Whistles must not be blown (except in emergency to avoid accidents) within the settled portions of cities or towns. On approaching street crossings, or dangerous places elsewhere, two long and two short blasts will constitute the signal. Unnecessary blowing of the whistle is prohibited."

"Rule 163. Running Down Grades. In descending grades, Motormen must allow car to coast, using power as little as possible and must be very careful to always keep car under control, never allowing it to run down grade faster than is consistent with absolute safety to passengers and property of the Company."

"Rule 171. Warnings. Motormen should warn all persons in the street especially those who are liable to come from rear of standing cars, who may be put in danger by progress of the car, and not run too close to them before doing so."

Among other requests the defendant asked the judge to give to the jury the following instruction:

"Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness Herbert A. Bumpus, the conductor of the car involved in the accident."

The judge refused to give this instruction, and in his charge referred to this matter, and also to the failure to call another witness, as follows:

"In this connection, I want to say, with reference to certain comment in argument that has been made by the plaintiff's

counsel on the failure of the railway company to call Herbert A. Bumpus, the conductor of the car in question at the time of the accident, and also its failure to call Dr. Paine, that it appeared that at the former trial of these cases, Bumpus was called as a witness by the plaintiff and examined, and was likewise called by the defendant and examined. At the present trial neither the plaintiff nor the defendant called him as a witness, though he was in court during the trial, as counsel now inform me.

"As to the comment as to the failure to call Dr. Paine, are you satisfied that he was called as a witness, and testified, for the defendant railway company at the former trial, upon the evidence? And if he did, and was not called here as a witness by the railway company, what inference, if any, should be drawn from the failure to call him? Did the plaintiff have an opportunity to call him? Generally, where testimony is within the exclusive control and knowledge of one party and not the other, and the party who could produce such testimony, does not do so, under such circumstances the jury might infer that such testimony, if produced, would be unfavorable to the party who had it in his exclusive control or knowledge. But where it is not within the exclusive control and knowledge of such party to offer such testimony, then no inference could be properly drawn against such party that such testimony, if produced, would be hostile. It is for the jury to say, under all the circumstances, what the fair inference is, if any, to be drawn against the company in not calling that witness."

During the trial the defendant's counsel stated that Bumpus was in the employ of the company at the time of that trial.

*Asd P. French, (J. W. French with him,) for the defendant.*

*W. R. Sears, (J. M. Hoy with him,) for the plaintiff.*

LORING, J. In his closing argument the plaintiff's counsel said, "If you gentlemen sitting here in this panel go to your jury room and come out and say that Morris London is to blame for his accident, — well, you make the law of Plymouth County, and you make it the law of Plymouth County that a man who is doing what Morris London was doing is not a prudent man. Was he not doing what you would do? Was he not doing what you would have done time and time again? I will pass the question. That's all there is to it. . . . And on the evidence as it has been sub-

mitted and as I have tried to epitomize it here, on the question of speed, on the matter of speed, gong and whistle, is there any question in your mind at all but that this collision occurred without the slightest warning, and occurred when the car was going full tilt down that hill, or after it got down the hill? Is there any question about it in your mind at all? If that is the way the accident occurred, is there any question about the propriety of the conduct of the men who were running that car? Is there any question about it at all? Do you expect that when you go out and get on a Bay State car, that you are going to be treated that way? That is the test. You make the law for Plymouth County in this case. Do you think that that is the kind of treatment that you ought to get when you get on one of these Bay State cars on the facts in the case? Do you expect an electric car, filled as this was, to be run down without any warning given to people ahead, or anything else, and to collide with a truck on the road? . . . Now, there is just one thing that I want to emphasize which I haven't spoken to you at all about, and that is the difference between the duty which is owed by the Bay State Street Railway Company to Mr. London and the duty owed by the auto truck to Mr. London. They are entirely different, altogether different. The Bay State Street Railway Company has certain franchises from the State; it can take by eminent domain, your own property, and lay out its tracks through them; and, in consideration of those privileges and its professions, it is charged with certain duties, and one of them is to transport safely its passengers; and the duty that it owes is the highest degree of care consistent with the practical operation of its business."

The defendant's attorney during an intermission which occurred after this portion of the plaintiff's closing argument had been made said to the presiding judge: "I desire to except to, and ask to have the jury instructed to disregard" the statements made in the three portions of the plaintiff's argument set forth above. In his charge to the jury the presiding judge said: "During the argument of the counsel for the plaintiff he made certain statements to which the counsel for the defendant rose and objected. One was with reference to the right of the railway company to take your land by eminent domain; the other was with respect to your making law in these cases for Plymouth County. It is

sufficient to say, perhaps, as to both of those that neither statement has any bearing on any issue that you are trying."

The plaintiff has contended that the statements contained in these three parts of the plaintiff's closing argument were correct statements of law. We are of opinion that they were not. It is the duty of the jury under the rules of law laid down by the judge to decide on the evidence presented the questions of fact in issue between the parties. Putting it at the highest, it is their duty to apply the law to the evidence. In no sense can it be said that it is their duty "to make the law," much less to "make the law" for one county. The law enforced by the courts of Massachusetts is the law of the Commonwealth applicable in each and every county alike. There is no law of one county as distinguished from the law of another county. It is not true that the reason why the defendant had to exercise "the highest degree of care consistent with the practical operation of its business" was because it had a right to "take by eminent domain, your own property, and lay out its tracks through them." The defendant had to exercise the "highest degree of care consistent with the practical operation of its business" because it was a common carrier. The same duty rests on all common carriers. For example, it rests on a common carrier who operates a stage coach or a "jitney" omnibus on a public highway. But the real grievance of the defendant is not that these statements of the plaintiff's counsel were wrong. Its real grievance is that this argument was an appeal to the jury to act in violation of their duty as jurors. It is the duty of jurors to decide under the rules of law laid down by the judge what on the evidence presented to them are the true facts of the case on trial. It is their duty to decide the issue submitted to them impartially as between party and party. What they have to do is, laying aside their likes, their dislikes and their prejudices, laying aside what they may conceive to be for their personal advantage or disadvantage, to decide the issue on trial impartially between party and party. The argument of the plaintiff's counsel in the case at bar was an appeal to the jury to take into consideration their interest as prospective passengers on the defendant railway and to decide the case so as to secure for themselves in the future the treatment they wished as passengers on that railway. The latter part of this argument was a covert appeal to the jury to make this great and powerful corpora-

tion (so powerful that it had the right of eminent domain) feel the jury's power in the case at bar. Or at any rate the argument might well have been taken by the jury to mean that. This argument as a whole called for rigorous and emphatic action on the part of the judge. The burden was upon him to make certain that the jury would disregard this appeal to them to violate their duty. The action taken by the presiding judge fell short of this. What the judge said was: "It is sufficient to say, perhaps, as to both of those that neither statement has any bearing on any issue that you are trying." That is not an instruction that the jury should disregard this argument. Nor is it an instruction equally favorable to the defendant. In *Commonwealth v. Poisson*, 157 Mass. 510, and *Bennett v. Susser*, 191 Mass. 329, relied upon by the plaintiff's counsel himself, it was laid down by this court that it is the duty of the presiding judge to instruct the jury to disregard an improper argument.

The plaintiff's next contention is that the defendant has not saved his rights; that if the defendant's counsel was not satisfied with the subsequent statement made by the judge it was his duty to tell the judge so and to except to his refusal to change what he then said. We are of opinion that this contention is without foundation. The defendant had in terms taken an exception to this argument of the plaintiff's counsel. He also asked the judge at that time "to have the jury instructed to disregard the statement." When he had taken an exception to the argument he had reserved his rights unless the judge cured the error which had been committed. The error in the argument to which the defendant took an exception was not cured by what the judge said. His rights were saved by the exception taken.

The case will have to go back for a new trial, and we will briefly consider questions argued here which are likely to arise there.

There was no evidence of any violation of rules 19, 45, 158, 163 and 171, (printed on pages 481, 482,) and they should not have been admitted in evidence. Since there was no evidence of the violation of these rules, it was error for the judge to deal with them as he did in his charge by instructing the jury that, "If you find they did not violate any of the rules, of course the rules are of no consequence in this case. If you find that they did violate one or more of them and such disobedience contributed to the accident,

that would be evidence tending to show negligence, for which the defendant is liable."

The jury should have been instructed that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness Herbert A. Bumpus, the conductor of the car involved in the accident." This case comes within *Fitzpatrick v. Boston Elevated Railway*, 223 Mass. 475, and not within *Little v. Massachusetts Northeastern Street Railway*, 229 Mass. 244.

There was evidence warranting a finding that the plaintiff was in the exercise of due care. *Eldredge v. Boston Elevated Railway*, 203 Mass. 582. *Dalton v. Boston Elevated Railway*, 217 Mass. 66. *Walsh v. Boston Elevated Railway*, 222 Mass. 275, where the cases are collected. It is not necessary to consider the effect of the answers given by the plaintiff as to the particular operations of his mind called forth by the cross-examination of the learned counsel for the defendant. It is not likely that this will be repeated at the coming trial. We do not intimate that the result of these answers was to deprive the plaintiff of the right to go to the jury on the question of his due care.

*Exceptions sustained.*

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SOLOMON WOLFF vs. MARY V. O'BRIEN & others.

Suffolk. November 14, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Devise and Legacy. Power. Landlord and Tenant.*

A testator devised and bequeathed all his property to his wife "for her natural life, with power to sell or mortgage said property if she considers it necessary," leaving the remainder to his children upon her death. The widow made a lease of certain real estate that had belonged to her husband, and died while three years of the term of the lease were unexpired. In a suit in equity by the tenant under the lease against the children of the testator to enjoin them from interfering with his quiet enjoyment of the property, it was held that the power of the widow to sell the property included the power to lease it, and that accordingly the lease was good against the defendants, and the tenant was entitled to an injunction.



BILL IN EQUITY, filed in the Superior Court on January 3, 1918, by the lessee of a house and lot on the Revere Beach Boulevard in Revere under a lease in writing from Catherine O'Brien, the widow of Daniel O'Brien, for a term extending to December, 1920, against the children of Daniel and Catherine O'Brien, to enjoin them from interfering with the plaintiff's quiet enjoyment of the leased property, Catherine O'Brien, the plaintiff's lessor, having died on December 22, 1917.

In the Superior Court the case was heard by Fox, J., who made a memorandum of decision as follows:

"The defendants are not estopped from asserting their rights as remaindermen. The single question is, whether the lease which the plaintiff holds from Catherine O'Brien, the life tenant, now deceased, is binding upon the remaindermen by reason of the power given to Catherine under the will of her husband.

"That will gives to Catherine 'all my property of every kind and description, whether real or personal or mixed, and wherever situated, for her natural life, with power to sell or mortgage said property if she considers it necessary. After the death of my said wife, to my children who survive her in equal division share and share alike.'

"The lease was executed in December, 1910, and gave the right of renewal to the lessee. A second lease was executed under the option, and the present lease expires in December of 1920. Catherine, the life tenant, died in December, 1917.

"The property is situated on the Revere Beach Boulevard, and when the lease was executed was in a run-down and untenable condition. At that time Catherine was unwilling to spend upon the property the money which was needed to put it in tenable condition, and no tenant could be expected to make the necessary expenditure unless secured by a lease for a term of years. About \$5,000 has been expended by the plaintiff and his subtenants in repairs and improvements since the execution of the lease.

"The act of Catherine in executing the lease was prudent and reasonable. Having regard to her circumstances and to the condition of the property, if these matters are material, I am of opinion that Catherine had the power to sell the entire fee of the

estate, and I see no ground for holding that she lacked the power to sell a lesser interest by executing the lease in question.

"Injunction to issue as prayed for, with costs."

By order of the judge a final decree was entered granting the injunction prayed for; and the defendants appealed.

*J. J. O'Brien & J. M. Sullivan*, for the defendants, submitted a brief.

*M. M. Horblit*, (*M. H. Horblit* with him,) for the plaintiff.

CARROLL, J. Daniel O'Brien died in September, 1898. He gave by will to his wife, Catherine, all of his property "for her natural life, with power to sell or mortgage said property if she considers it necessary." After her death it was devised to their children, who are the defendants in this suit.

Catherine leased the property to the plaintiff, the lease expiring in December, 1920. She died in 1917. The defendants have in writing notified the plaintiff to quit the premises; and he brings this bill praying for an injunction restraining the defendants from taking possession of the premises and interfering with his possession. In the Superior Court a decree was entered for the plaintiff.

In *Kent v. Morrison*, 153 Mass. 137, the will gave the testator's wife his entire estate with full power "to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper." It was held that the widow took an estate for life, with authority to sell and convey for any purpose and to use the proceeds as she might think proper; that the power to sell and convey includes the power to mortgage; that she could sell the whole or any part of the property; and that "Such a power is as ample as that of an owner. . . . It is an absolute and unrestricted power to sell for the benefit, and in the discretion, of the devisee of the power." The case at bar is governed by *Kent v. Morrison*, *supra*. See *Hedges v. Riker*, 5 Johns. Ch. 163.

The decree of the Superior Court is affirmed with costs.

*So ordered.*

SAMUEL SCHWARTZ *vs.* AMERICAN SURETY COMPANY OF NEW YORK & others.

Worcester. November 18, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE & CARROLL, JJ.

*Surety. Bond. Waiver. Contract, Ratification.*

Where a surety company has become the surety upon a bond of a building contractor, given by him to a landowner for the faithful performance of a contract to build a house on the land of such owner to be completed by November 1 of that year, if without the knowledge of the surety the landowner and the contractor make an agreement extending the time for the completion of the house until Christmas of that year, the surety is discharged.

*Whether* a surety on a bond for the faithful performance of a contract between a landowner and a building contractor can be held under any circumstances to have ratified a further contract made between the landowner and the contractor for their own benefit and convenience, or *whether* the principle of ratification has no application to such a case, here was mentioned as a question which it was unnecessary to pass upon because there was no evidence of the necessary elements of a ratification.

CONTRACT against the American Surety Company of New York, a corporation, as surety, and the Hancock Engineering Company, a corporation, as principal, and also against the assignee of the last named corporation, on a bond given by the Hancock Engineering Company to the plaintiff for the faithful performance by that company of a contract in writing made by it with the plaintiff dated June 22, 1914, to build for the plaintiff a dwelling house on Lenox Avenue in Worcester. Writ dated January 1, 1915.

In the Superior Court the case was tried before *Morton, J.* The material evidence is described in the opinion. The defendant surety asked the judge to make the following rulings:

"10. That upon all the evidence the jury must find that the plaintiff failed to perform the conditions precedent as set forth in the bond, and therefore the plaintiff cannot recover from the defendant the American Surety Company."

"14. That upon all the evidence there was no waiver by this defendant, the American Surety Company.

"15. That there was no evidence of any waiver by any person

authorized to make a waiver for the defendant the American Surety Company."

In the bill of exceptions then followed this statement:

"No written motion was filed by this defendant to direct a verdict unless and except the first request which was 'That upon all the evidence the plaintiff is not entitled to recover' or the above requests shall constitute such a motion."

The judge refused to make any of these rulings. He submitted to the jury four questions, which with the answers of the jury were as follows:

"1. Did the American Surety Company, on December 17, 1914, ratify the action of the plaintiff in extending the time for completion of the building from November 1, 1914, to Christmas, 1914?" The jury answered, "Yes."

"2. Did the plaintiff himself, or by his attorney or architect, contract with the Hancock Engineering Company for extras in excess of the sum of \$287.50?" The jury answered "No."

"3. What was the amount reasonably necessary to complete the house according to plans and specifications, including liens paid by the plaintiff?" The jury answered, "\$4,610."

"4. Was there a material change in the construction of the house?" The jury answered, "No."

In the bill of exceptions then followed this statement:

"It is agreed that there was no evidence of any breach on the part of the plaintiff other than the alleged breach for failure to notify the surety company of the extension of time for the performance of the contract and that the point of waiver raised is as to whether or not the company waived this alleged breach."

The judge in his charge to the jury instructed them in part as follows:

"No change could be made in it [the contract] by the plaintiff and the Hancock Engineering Company without the consent of the insurance company, and if such a change was made and it was not thereafter ratified by the insurance company the bond is null and void and the plaintiff cannot recover under it.

"If it was ratified by the surety company, by their agents duly authorized, then a breach of the condition is accepted and would not prevent the plaintiff from recovering.

"There is no question but that the contract called for the com-

pletion upon November 1. There is no question but that it was subsequently changed by agreement of the Hancock Engineering Company and the plaintiff to Christmas of that same year. The time was extended, in other words, from November to Christmas, and it is not claimed that at the time it was done the surety company knew of and assented to it. It is claimed that subsequently, to wit, on December 17, the surety company through its officers who have appeared here was notified of the change knew of the change and knowing of it ratified the change.

"If Mr. Philbrick, or the other officer at that interview, in substance told the parties, Mr. Clark and the plaintiff, to go home and finish the building and the insurance company would pay the bills, or if the representative of the company used words the natural import of which was to indicate that they agreed to be responsible for any demand on any bills given in finishing that building, then they ratified the extension for all time. It must be presumed that they knew that the date was down on the contract as November 1. If they made any such agreement as that in the middle of December, six weeks or more after the contract ought to have been completed and they knew the contract had not been completed by November 1 and with that knowledge, if they made such an agreement, they must be bound by it as a ratification of something which the plaintiff and the defendant could not hold the company to unless ratified.

"You have a right to determine, then, from the testimony of these various witnesses as to what took place, as to what was said at that interview and whether or not a true and fair and reasonable construction of what was said at that time consisted of such a ratification, the burden being upon the plaintiff to satisfy you there was such a ratification."

The defendant surety excepted to the part of the judge's charge quoted above.

The jury returned a verdict for the plaintiff against the defendant surety in the sum of \$2,875, the penal sum of the bond, and returned a verdict against the principal on the bond in the sum of \$3,275.93. The defendant surety alleged exceptions.

The case was submitted on briefs.

*L. S. Hamburger*, for the defendant surety.

*E. H. Vaughan, E. T. Esty & J. Clark, Jr.*, for the plaintiff.

CARROLL, J. The plaintiff (hereinafter called the owner) entered into a written contract with the Hancock Engineering Company (hereinafter called the contractor) for the erection of a house in Worcester. A bond was given to the owner for the faithful performance of the contract, with the contractor as principal and the American Surety Company of New York as surety. The condition was that, if the contractor should indemnify the owner against all loss or damage "directly arising by reason of the failure" of the contractor to perform faithfully the building contract, the bond was to be void, "otherwise to remain in full force and effect."

The contract was dated June 22, 1914. By its terms the house was to be completed November 1, 1914. Without the knowledge of the surety, by agreement of the owner and contractor the time for completion was extended to Christmas, 1914. The surety asked the judge to instruct the jury "That there was no evidence of any waiver by any person authorized to make a waiver for the defendant, the American Surety Company" and "That upon all the evidence there was no waiver by this defendant." The jury, in answer to a question, found that on December 17, 1914, the surety ratified "the action of the plaintiff in extending the time for completion of the building from November 1, 1914, to Christmas, 1914," and returned a verdict for the plaintiff.

The obligation assumed by the surety was that the contractor should complete the building on the first of November, 1914. The extension of time to Christmas, 1914, was a substantial change in the contract and as modified it was not the contract for the faithful performance of which the surety bound itself. The agreement for the extension without its knowledge or consent, discharged the surety. *Greely v. Dow*, 2 Met. 176. *Atkins v. Boylston Fire & Marine Ins. Co.* 5 Met. 439. *Appleton v. Parker*, 15 Gray, 173. *Warren v. Lyons*, 152 Mass. 310. There was no evidence that the surety knew of the modification in the contract extending the time of its performance, either when the change was made or subsequently thereto, before the action was brought.

The plaintiff in his brief contends that the time stipulation of the contract was waived, and to show this he relies on certain statements made December 17, 1914, by Philbrick and Roberts, representatives of the American Surety Company. At that time

the plaintiff and his attorney met Philbrick and Roberts at the office of the American Surety Company of New York, in Boston. The plaintiff testified that at this interview Philbrick and Roberts were told "the Hancock Engineering Company had failed and that now they wanted the company to complete the house," to which Philbrick said, "We will not finish the building, why don't you people go ahead — go ahead and finish — you have that right and produce the bills for us." Although the surety knew that the contractor had not performed its contract, there is nothing in the conversation or in any of the evidence to show that when this conversation took place the surety knew that the contract had been altered and the time for performance had been extended; indeed, there was evidence that the defendant was ignorant of this fact until the time of trial. Assuming, but not deciding, that the representatives of the surety were authorized to waive the terms of the original contract and bind the surety by a new and different agreement from the one stipulated in the bond, there is nothing disclosed in the record to indicate such a waiver. To constitute a waiver there must be knowledge of the right which is claimed to have been waived. *George N. Pierce Co. v. Beers*, 190 Mass. 199, 205. When the owner agreed with the contractor to extend the time for performance beyond November 1, the surety was discharged, and it did not waive the right to rely on this discharge without knowledge of the facts. Even if we assume that all the other elements of waiver are present, there is no evidence to show that the surety knew the time had been extended; nor did the facts disclose anything from which an inference could be drawn that it had knowledge of the modification and change in the contract.

Without intimating that the surety could be held to have ratified the agreement made by the owner and the contractor for their own benefit and convenience, (see, in this connection, *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381, 382,) it is enough to say that when the principle of ratification is applicable in order to become effective it must appear that the ratifier had full knowledge of the essential facts of the act or contract to be ratified. *Dickinson v. Conway*, 12 Allen, 487. *Manning v. Leland*, 153 Mass. 510, 513.

As the case was tried in the Superior Court and on the excep-

tions before us, it is unnecessary to consider the effect of article seven of the building contract, providing for an extension of time if the contractors were delayed in the prosecution of the work through the fault of the owner, the architect, or other contractors employed by the owner, for a period fixed by the architect, if the claim is presented in writing within forty-eight hours after the delay. Nor is it important to pass upon the bearing of article five of this contract, or on the first condition of the bond, requiring notice to the surety within ten days after knowledge of the default of the contractor.

The only questions open on this bill of exceptions are these: Was there any evidence for the jury that the surety ratified the action of the plaintiff in extending the time, and should the surety's request that there was no waiver have been given. In submitting to the jury the question of the ratification and in refusing the surety's request, there was error of law.

We do not deem it necessary to discuss the question raised by the plaintiff in his brief, that no written motion was made by the surety to direct a verdict in its favor. The request of the defendant surety, that on all the evidence there was no waiver, should have been given and the instructions to the jury were wrong.

*Exceptions sustained.*



WILLIAM J. MCCARTHY COMPANY vs. ALVAN T. FULLER.

Suffolk. November 18, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Contract, What constitutes.*

In an action by a corporation for the breach of an alleged contract to sell and deliver to the plaintiff a Packard motor truck, it appeared that the contract was in writing and was signed by the president of the plaintiff and by a salesman of the defendant, to whom it was delivered after its execution. When the contract was offered in evidence at the trial, there was written in typewriting below the signature of the plaintiff's president these words: "Not valid unless countersigned by an executive of the Packard Motor Car Co. of Boston." The contract was not so countersigned. The plaintiff's president testified in regard to these words, that when the contract was signed he "did not see anything there and didn't know whether they were there or not." The defendant's salesman testified that he saw no change in the contract and specifications "from the time



Mr. S [the plaintiff's president] signed them." *Held*, that the plaintiff was entitled to go to the jury, who might refuse to believe the testimony of the defendant's salesman to the effect that there had been no change in the contract, and on the testimony of the plaintiff's president, that he did not see the typewritten words below his signature, could find that they were not a part of the contract when it was signed, notwithstanding the witness's further statement that he did not know whether the words were there or not.

In the case above described it was *said* that, in view of the decision stated above, it was unnecessary to consider whether there was evidence that the requirement of the signature of an executive officer was waived by the defendant.

CONTRACT against Alvan T. Fuller, doing business under the name Packard Motor Car Company of Boston, for the breach of an alleged contract to sell and deliver a Packard motor truck to the plaintiff. Writ dated September 4, 1915.

In the Superior Court the case was tried before *White, J.* The evidence is described in the opinion. At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover and to order a verdict for the defendant. The judge so ruled and ordered and by agreement of the parties reported the case for determination by this court, with the stipulation that, if such ruling and order were right, judgment should be entered on the verdict for the defendant; if the case ought to have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$400 and taxable costs.

*J. E. Crowley*, for the plaintiff.

*R. J. Cram*, for the defendant.

CARROLL, J. This is an action of contract to recover for the defendant's failure to deliver a motor truck.

There was evidence that Sullivan, the plaintiff's president, negotiated with a salesman of the defendant, named Sawyer, for the purchase of a "Packard truck;" that later he saw a salesman named Kimball and the written contract in evidence was signed by Sullivan and Kimball; that this contract was delivered to the latter, and, when offered at the trial, contained in typewriting below the plaintiff's signature these words: "Not valid unless countersigned by an executive of the Packard Motor Car Co. of Boston." The contract was not so countersigned.

Sullivan testified, referring to the words, "Not valid unless countersigned by an executive of the Packard Motor Car Co. of Boston," that when the contract was signed he "did not

see anything there and didn't know whether they were there or not." On the day following the execution of the contract the plaintiff received a letter from Kimball saying that one Prime, a sales manager and executive officer of the defendant, "tells me everything is O. K. and he is now making arrangements for the body with the Woonsocket Wagon Co." Kimball testified that when the contract was shown to Prime he said, "the transaction was good work;" that the letter showing Prime's approval was written in Prime's office and that he told Kimball to notify Sullivan that "the contract was all right." Kimball further testified that he saw no change in the written contract and specifications "from the time Mr. Sullivan signed them." The case is here on the report of a judge of the Superior Court.

The jury could have refused to believe the evidence of Kimball to the effect that there was no change in the contract after it was signed; they could have believed the evidence of Sullivan that he did not see the typewritten words below his signature and on this evidence could have found that these words were not a part of the contract when it was signed. They could have so found, notwithstanding Sullivan's further testimony that he did not know whether the words were there or not. The latter statement was not necessarily inconsistent with the former statement that "he did not see anything there." Plainly it was a question for the jury to decide how far, if at all, Sullivan's testimony was to be believed; and what part of it was to be relied on and what part of it was to be rejected. If they believed that the words requiring the signature of an executive officer were not a part of the contract when signed by Sullivan and Kimball, they could have found for the plaintiff.

As there was evidence of a breach of the contract binding upon the parties, it becomes unnecessary to discuss the question of the waiver by Prime of the stipulation requiring the signature of an executive officer, even if this stipulation were a part of the contract when signed.

The statute of frauds is alleged in the answer, but this defence has not been argued and we treat it as waived.

As the case should have been submitted to the jury, according to the report judgment is to be entered for the plaintiff for \$400 and taxable costs.

*So ordered.*

BOYLSTON BOTTLING COMPANY vs. PATRICK W. O'NEILL &  
another.

Suffolk. November 19, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Contract, Validity. Surety. Wrongdoer without Remedy. Sale, When title passes. License. Intoxicating Liquors.*

A contract to pay a man \$60 a week for delivering beer sold in part in Boston, where such sale was lawful, and sold in part in Brookline, where such sale was unlawful, is wholly void, a single consideration being paid for the lawful and the unlawful services.

The surety on a bond, which was given to ensure the faithful performance of an unlawful contract, cannot be held liable for a breach of the bond by the principal, because the courts will not enforce the obligation of an unlawful contract.

A liquor dealer doing business on premises owned by him on a street in Boston, under a license of the fourth class, authorizing him "to sell liquors of any kind, not to be drunk on the premises," gave to the driver in charge of one of its delivery wagons a written order upon a brewery in another part of Boston for the beer necessary to fill certain written orders for beer to be delivered by the driver in a certain district in Boston and in Brookline. The driver presented this order to the brewery and received the beer described in it. He then "placed upon the various cases and packages" tags of the dealer on which were written the names and addresses of the various customers to whom the beer was to be delivered. Under the terms of his employment the driver "was required to collect the price of the liquor on delivery, and, in the event of failure to collect the price, to withhold delivery and to return the merchandise to the" dealer. In an action, in which the validity of the contract of employment of the driver was involved, these facts appeared by the record, and it was assumed by the parties that the sales of the packages of liquor delivered in Boston were lawful. *It seems*, that this assumption was wrong, as a license authorizes a sale on the premises described in it and the premises described in the dealer's fourth class license were its place of business owned by it; and on the facts stated above it did not appear that the sales in Boston were made on the premises of the dealer described in its license.

CONTRACT upon the bond printed below, against the defendant O'Neill as principal and the defendant Noonan as surety, alleging that the defendant O'Neill was employed by the plaintiff as a driver and collector and that he committed a breach of the bond by failing to account for certain packages of property of the

plaintiff received by him. Writ in the Municipal Court of the City of Boston dated June 15, 1917.

The bond was as follows:

"Know all men by these presents that we Patrick William O'Neill of Boston in the county of Suffolk as principal and Sarah N. Noonan as surety stand firmly and justly bound unto the Boylston Bottling Company, a corporation duly organized and existing by law, and having a usual place of business in Boston in the full and just sum of \$500 to the payment of which to the said Boylston Bottling Company, its successors and assigns, we hereby bind ourselves, our heirs, executors and administrators.

"The condition of this obligation is such that if said Patrick William O'Neill, who is about to be employed by said Boylston Bottling Company, shall render a faithful account of all merchandise delivered to him and money collected by him and shall return all packages received by him from the company or account to the company for the value of any not so returned, then this obligation shall be void and of no effect but otherwise shall remain in full force and virtue.

"Witness our hands and seals this 4th day of November 1916.

Patrick W. O'Neill [SEAL]

Sarah N. Noonan [SEAL]

79 Park Drive Brookline."

The answer of the defendant O'Neill contained the allegation "that, if the plaintiff shall prove a contract upon which the alleged bond was given, the same was illegal." The answer of the defendant Noonan, as amended, contained an allegation "that, if it shall appear that the principal upon the bond, alleged in the declaration, ever did any of the things set out in the plaintiff's declaration, that the same were done or performed under a contract in violation of the laws of this Commonwealth; and this defendant is not to be held to pay for any amount."

The material evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence the defendant Noonan asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and found for the plaintiff in the sum of \$451.45. At the request of the defendant he reported the case to the Appellate Division.

The Appellate Division made an order that the report be dismissed; and the defendant Noonan appealed.

The description of a license of the fourth class to sell intoxicating liquors contained in R. L. c. 100, § 18, is as follows:

"Fourth class. To sell liquors of any kind, not to be drunk on the premises."

*J. E. Crowley*, for the defendant Noonan.

*H. S. Davis*, for the plaintiff.

LORING, J. This is an action for breach of a bond. The condition of the bond is that "said Patrick William O'Neill, who is about to be employed by said Boylston Bottling Company, shall render a faithful account of all merchandise delivered to him and money collected by him and shall return all packages received by him from the company or account to the company for the value of any not so returned." The breach alleged is that O'Neill "received from the plaintiff ten hundred and sixty-four dozen bottles of the value of thirty cents a dozen and three hundred and sixty-one cases of the value of forty cents apiece, for which he has failed to account." The surety on the bond pleaded (*inter alia*) that, "if it shall appear that the principal upon the bond, . . . ever did any of the things set out in the plaintiff's declaration, that the same were done or performed under contract in violation of the laws of this Commonwealth." At the trial the judge refused to rule "that upon all the evidence the plaintiff was not entitled to recover" and reported the case to the Appellate Division of the Municipal Court. The Appellate Division directed that the report be dismissed and from that order the surety took the appeal which is now before this court.

We agree with the plaintiff that in deciding the question before us (whether as matter of law the plaintiff was not entitled to recover) the evidence favorable to the defendant must be laid on one side. The surety's contention is that on the plaintiff's own evidence O'Neill (the principal defendant) as matter of law was employed for a single sum to do work which was illegal in part; that for this reason the whole employment was illegal and that as a result the law will leave the parties where it finds them. If this be so, the ruling asked for ought to have been given.

It is stated in the report "that the plaintiff employed O'Neill to deliver intoxicating liquor sold by it in Roxbury and in Brook-

line and agreed to pay him for his services in that connection the sum of \$60 a week." It is further stated that "the defendant O'Neill was the holder of a license from the selectmen of the town of Brookline, under which he was permitted as an expressman to make deliveries of intoxicating liquor in Brookline." It must be taken that this license was granted to O'Neill under St. 1906, c. 421, and the acts in amendment of that statute. From this it follows that on this record it must be taken that Brookline was a no-license town.

"It appeared that the plaintiff was engaged in the sale of intoxicating liquor on Lamartine Street in the city of Boston under a license of the fourth class issued by the licensing board of the city of Boston." The surety's contention is that the contract between the plaintiff and O'Neill by which "the plaintiff employed O'Neill to deliver intoxicating liquor sold by it in Roxbury and in Brookline" was an illegal contract so far as it provided for the delivery of "intoxicating liquor sold by it [the plaintiff] . . . in Brookline" and that the consideration paid O'Neill being an undivided sum (\$60 a week for all his services) the contract was an illegal one although the delivery of liquors sold in Boston was legal.

It is established that a party to an illegal contract will be left by the law where the law finds him. A collection of authorities on that point is not necessary. For a recent case in which the proposition is well stated and a collection of some of the authorities is made, see *Pelosi v. Bugbee*, 217 Mass. 579. It is also established that a contract for a single consideration is wholly void if that single consideration is paid in part for an illegal act. *Bishop v. Palmer*, 146 Mass. 469. *Kennedy v. Welch*, 196 Mass. 592. *Murphy v. Rogers*, 151 Mass. 118. *Andrews v. Frye*, 104 Mass. 234.

The answer of the plaintiff to this contention is, that "there is no evidence that the goods referred to in the declaration were delivered to O'Neill for transportation to points in Brookline and not to points in Boston." The objection which the plaintiff has to meet is, that O'Neill was employed for a single sum in part "to deliver intoxicating liquor sold by it [the plaintiff] . . . in Brookline" and that that part of the employment being illegal and the consideration being single the whole contract is void.

The plaintiff's next contention is that this case comes within the established rule that where money is placed by A and B in the hands of a stakeholder to be paid over to the winner of a bet between A and B, A or B can revoke the stakeholder's authority before the money is paid over and recover from the stakeholder the money paid him by the person revoking the stakeholder's authority. This is established by the cases of *Fisher v. Hildreth*, 117 Mass. 558, and *McKee v. Manice*, 11 Cush. 357. Those cases go on the ground that the payment of the money to the stakeholder in such a case is not an illegal transaction and that so long as the matter is executory and the money has not been paid over either party can revoke the authority to pay the money in the illegal way theretofore authorized.

The plaintiff has also placed great reliance on the case of *Bone v. Ekless*, 5 H. & N. 925. The decision in that case went on the same ground. In that case the plaintiff had sold a vessel to the Turkish government for £6,500 under an authority from the defendant to pay £500 of the purchase money as a bribe to certain Turkish officials to secure the sale to the Turkish government. Later the plaintiff sued the defendant for the sum of £426 due from the defendant to him and the defendant pleaded in set-off that of the £6,500 received by the plaintiff to the defendant's use he had paid over to them £6,000 and that he had paid in bribes £300, but that he had kept in his own pocket the remaining £200. To this the plaintiff answered that he had promised to pay the £200 (which he kept) as a bribe to an official of the Turkish government, although he had not yet paid it over. The court held that the £6,500 received by the plaintiff was the defendant's money and that the defendant had a right to revoke the plaintiff's authority to pay over as a bribe the £200 which he had not paid over. This conclusion was reached on the ground on which it is held in this Commonwealth that the authority of a stakeholder to pay the money deposited with him to the winner of a bet can be revoked so long as the matter is executory and the money has not been paid over. The sale of the ship in *Bone v. Ekless* was not an illegal transaction although it had been procured by fraud and so could have been avoided by the Turkish government. The illegal transaction there in question consisted in the payment of the £500 as bribes. But in the case at bar

O'Neill's employment was an illegal one. It was an illegal one because he was employed in part to deliver liquor sold in violation of law and was paid a single sum for all his services. It is not necessary to examine in detail the cases in other jurisdictions which have been cited. If they go beyond this they are not law in this Commonwealth.

We have decided the case at bar on the footing on which it was argued. But a word must be added to prevent its being misunderstood. The case was argued on the footing that the sales made in Boston were legal. On the record it would seem that they were illegal. It is stated in the report that "the employment [of O'Neill by the plaintiff] was carried out in the following manner." The plaintiff recorded on its books at its store on Lamartine Street all "orders for liquor" received by it. It delivered to O'Neill a written order on Haffenreffer and Company ("a brewery located in the city of Boston, which furnished the plaintiff with beer") for the beer necessary to fill these orders. O'Neill then drove with his truck to the brewery, presented this order to it and received from it the beer called for. He then "placed upon the various cases and packages" tags (bearing the name and address of the plaintiff) on which there was written the name and address of the customer to whom the beer was to be delivered. "O'Neill also entered in a book which he kept for the purpose the date of reception, a transcript of the marks on the packages and the dates of delivery of the liquor which he so received and delivered. Under the terms of his employment, O'Neill was required to collect the price of the liquor on delivery, and, in the event of failure to collect the price, to withhold delivery and to return the merchandise to the plaintiff." The beer so sold by the plaintiff was not sold on the premises owned by the plaintiff "on Lamartine Street" and it must be taken on the record that the premises described in the plaintiff's fourth class license were its premises on Lamartine Street. A license authorizes a sale on the premises described in it. A sale by the person licensed made elsewhere than on the premises described in the license is not protected by it and is an illegal sale.

The result is that the order dismissing the report must be reversed and judgment entered for the surety.

*So ordered.*



JAMES S. BUCKLEY, administrator, *vs.* WILLIAM P. SUTTON & another.

Middlesex. November 19, 20, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Agency*, Existence of relation, Scope of authority. *Negligence*, In use of highway, Contributory, Motor vehicle.

In an action, by an administrator against copartners doing business under the name of an ice cream company, for causing the death of the plaintiff's intestate by running over him with a motor truck, if it appears that the motor truck which ran over the intestate was marked with the name of the ice cream company, that it had a couple of barrels on it and was driven by one G, and if one of the defendants, when asked the question, "If he [G] was out with an automobile truck of the . . . ice cream company, you would say that he was about your business?" answers, "Naturally, yes," there is evidence that at the time of the accident the driver of the truck was in the defendants' employ and was engaged in their business.

If a boy eleven years of age, who has been on a motor truck that was moving on the right hand side of a city street with another motor truck moving behind it on the same side of the street, gets off the truck on which he was and, after looking ahead for vehicles approaching from the opposite direction, starts to walk in a diagonal direction to his left across the street, which is paved with wooden blocks, and if the motor truck behind turns to the left to go by the one in front of it, sounding no horn and making little or no noise, and, when the boy is within six feet of the gutter, a companion who has remained on the first truck yells to him, and the boy then starts to run and is struck and killed by the motor truck when he is about two feet or one foot from the left hand curbstone, there having been ample room for the truck to pass the other truck in front of it without running down the boy, in an action, brought after the enactment of St. 1914, c. 553, against the owner of the motor truck, whose servant was driving it in the course of the owner's business, for causing the death of the boy, in which these facts are shown, the questions whether the boy was negligent and whether the defendant's servant was negligent are for the jury.

TORT by the administrator of the estate of James S. Buckley, junior, late of Cambridge, the first count of the declaration for causing the death of the plaintiff's intestate, then eleven years of age, by running him down with a motor truck driven negligently by a servant of the defendants on Cambridge Street in Cambridge on September 14, 1916. There was a second count alleging conscious suffering. Writ dated October 6, 1916.

The defendants' answer contained an allegation that the alleged injuries of the intestate were the result of contributory negligence on his part.

In the Superior Court the case was tried before *Quinn, J.* The defendants offered no evidence and at the close of the plaintiff's evidence, which is described in the opinion, filed a motion asking the judge to order a verdict for them. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff and assessed the damages on the first count in the sum of \$5,000 and on the second count in the sum of \$800. The defendants alleged exceptions.

*E. I. Taylor*, for the defendants, submitted a brief.

*J. H. Hurley*, for the plaintiff.

CARROLL, J. This action is to recover damages for the conscious suffering and death of James S. Buckley, who was run over by a motor truck of the defendants on September 14, 1916. He was eleven years of age. At the close of the plaintiff's evidence the defendants moved that a verdict be directed in their favor. The motion was denied.

It was admitted that the defendants did business under the name of the Mansion House Ice Cream Company. There was evidence that the words "Mansion House Ice Cream Company" were on the truck which injured the plaintiff's intestate and that it was operated by one Giganti, who was employed by the defendants. It was a "White truck" and "there were a couple of barrels on it." In answer to the question, "If he [Giganti] was out with an automobile truck of the Mansion House Ice Cream Company, you would say that he was about your business?" one of the defendants answered, "Naturally, yes." This was some evidence that at the time of the accident Giganti, who was in charge of the defendants' motor truck, was in the defendants' employ and was engaged in their business. *Heywood v. Ogasapian*, 224 Mass. 203.

The plaintiff's intestate was riding on another motor truck which was proceeding along the northerly side of Cambridge Street in Cambridge, in front of the defendants' truck. There was evidence that the left hand wheels of the truck on which the intestate was, were on the right hand rail of the outward bound car track. The plaintiff's intestate got off the truck and started

to walk in a diagonal direction across Cambridge Street toward the southerly side. He looked toward First Street, toward the point where other vehicles were coming in the opposite direction. Giganti attempted to pass the truck on which the plaintiff's intestate had been riding. A boy, who had been with the intestate on that truck and who remained on it when the intestate got off, testified that, "When the Buckley boy was about within six feet of the gutter, the witness yelled to him." The intestate then started to run and was struck about two feet from the curbstone of the southerly side of Cambridge Street.

The intestate's due care was for the jury. He looked in the direction from which vehicles might be expected. The street was paved with wooden blocks and the jury could say that the defendants' truck made little or no noise and that no signal of its approach was given. The boy was near the curb when struck, and on that side of the street where the defendants' truck going toward Cambridge would not be expected. *Duggan v. Bay State Street Railway*, 230 Mass. 370. *Mullin v. Fallon*, 229 Mass. 214. *Miller v. Flash Chemical Co.* 230 Mass. 419.

There was evidence that the day was clear, that no horn was sounded, and, as the boy started to run toward the sidewalk, "the automobile started toward that side that he was running to," and there was evidence from one witness that, when the boy was walking, the defendants' motor truck "turned to the left and went after him and kept going after him until it finally caught him, about one foot from the left hand curbstone on Cambridge Street." There was ample room to pass without running down the plaintiff's intestate. On this evidence the defendants' negligence was plainly a question for the jury to decide.

*Exceptions overruled.*

## WILLIAM J. BARBER vs. C. W. H. MOULTON LADDER COMPANY.

Middlesex. November 20, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, &amp; CARROLL, JJ.

*Way, Private. Negligence, In maintenance and operation of gate.*

In an action for personal injuries sustained when the plaintiff was eleven years of age by reason of a gate of the defendant falling upon him, there was evidence that the plaintiff was on a private street, that there were houses on this street, in one of which the plaintiff's father lived, and other buildings including those of the defendant, that this street was used for "free traffic" and "foot travel" in the same manner as "any other street," and that the plaintiff had no other means of access to his home. There was no evidence that the defendant had title to any portion of the land under such way or even to the land abutting on the way which it occupied for the transaction of business. *Held*, that on this evidence it could be found that the plaintiff when injured was not a trespasser nor a mere licensee and that the defendant accordingly was required to take reasonable precautions in the maintenance and management of its gate not to injure the plaintiff when he was in this private street in the exercise of due care.

In the case above described it appeared that before the accident happened the plaintiff in going out from the defendant's yard had climbed over the gate, which then was held up by a rope, but it appeared by the evidence that the plaintiff's act in climbing over the gate did not contribute to its subsequent fall when the rope was unfastened. It also appeared that the plaintiff, after he was in the private street, walked back to the defendant's gate and looked through an opening between the side of the gate and a building to see whether his companions were coming from the yard and then, instead of going directly home, took about six steps from the gate and stooped down to look under another gate on the opposite side of the street into a yard to see some dogs, that while he was in this position the defendant's gate, on which the rope had been unfastened by a servant of the defendant, fell upon him, causing the injuries. *Held*, that it could not have been ruled as matter of law that the plaintiff acted carelessly, and that the question, whether he was negligent, was for the jury.

In the same case, it appeared that the gate was maintained and used by the defendant in its woodworking business. There was evidence that an overhead iron track, on which the gate originally had been hung, had been removed and that the travelling wheels, except two that were useless, had been removed, that at the time of the accident the gate rested on a roller of wood placed on the ground, by the use of which it was opened and closed, that, when it was closed, the upper part of the gate leaned at one end against a shed and at the other end was secured and held in an upright position by a rope fastened to an iron hook in the side of a building or to a steel rail that ran across the passageway, and that the gate had been tied up in this way by the defendant's yard foreman, when at

some time before the accident he had found the gate lying on the ground and had restored it to this position, that at the time of the accident the defendant's yardman, who was following the plaintiff when he climbed over the gate, was seen "fumbling" with the rope when the gate fell and that after the accident the rope unbroken was found attached to the gate. It could have been found that the yardman, among other duties, had charge of the gate and knew of its dilapidated condition. *Held*, that the jury were warranted in finding that the defendant was negligent in the construction or maintenance of the gate and that the fall of the gate was caused by the negligence of an employee of the defendant acting within the scope of his duty, and accordingly that a motion to order a verdict for the defendant was denied rightly.

TORT for personal injuries sustained on July 30, 1915, when the plaintiff was eleven years of age, by reason of the negligence of the defendant in permitting a gate, which it was its duty to maintain in a safe condition, to be defective and out of repair, and by reason of the negligent management and operation of the gate by a servant of the defendant which caused it to fall upon the plaintiff. Writ dated October 15, 1915.

The defendant's answer, as amended, contained an allegation that the plaintiff was not in the exercise of due care and that the injury alleged to have been sustained by him was caused in whole or in part by his own negligence.

In the Superior Court the case was tried before *Hitchcock, J.* The evidence is described in the opinion. At the close of the evidence the defendant made a motion that a verdict be ordered for it. The judge denied the motion and the defendant excepted. The defendant then asked for certain rulings, but it was stated in the bill of exceptions that "no exception was taken with respect to the court's disposition of the requests for rulings or to the charge."

The judge submitted to the jury three special questions, which with the answers of the jury were as follows:

"1. Was the falling of the gate by which the plaintiff was injured caused by any negligence on the part of the defendant in the construction or maintenance of the gate?" The jury answered, "Yes."

"2. Was the falling of the gate by which the plaintiff was injured caused by any negligence on the part of any servant or employee of the defendant, acting within the scope of his employment?" The jury answered, "Yes."

"3. Was the falling of the gate by which the plaintiff was injured

caused wholly or in part by any act of the plaintiff in climbing over the gate?" The jury answered, "No."

The jury returned a verdict for the plaintiff in the sum of \$7,500; and the defendant alleged exceptions.

*H. D. McLellan, (C. F. Lovejoy with him,)* for the defendant.

*E. J. Flynn, (C. J. Muldoon, Jr., with him,)* for the plaintiff.

BRALEY, J. The plaintiff, a lad eleven years of age, was standing in a private way in Somerville known as Earle Street, when the defendant's gate fell upon him, causing serious personal injuries for which the jury have awarded substantial damages.

The first contention is, that there is no evidence which would warrant a finding that at the time of the accident the company owed him any duty of exercising reasonable care for his safety. It appeared and the jury properly could find that while not a "through street," there were houses, in one of which the plaintiff's father lived, and other buildings, including the defendant's, on the street, which was used for "free traffic" and "foot travel" in the same manner as "any other street," and that the plaintiff had no other means of access to his home. The establishment or location of the way whether by grant or prescription, is not shown, and there is no evidence that the defendant had title to any portion of the soil of the way, or even to the land abutting on the way which it occupied for the transaction of business. The plaintiff being neither a trespasser nor a mere licensee, the defendant therefore was required to take reasonable precautions in the maintenance and management of the gate to avoid injury to him when in the street and in the exercise of due care. *Moffatt v. Kenny*, 174 Mass. 311. *Coles v. Boston & Maine Railroad*, 223 Mass. 408.

While the exceptions recite that, apart from the request to order a verdict for the defendant, no exceptions were taken "with respect to the court's disposition of the requests for rulings or to the charge," the question, whether as matter of law the plaintiff is chargeable with contributory negligence is open. The jury were warranted in finding in answer to the third question, that the falling of the gate was not caused "wholly or in part by any act of the plaintiff in climbing over the gate." It is enough to say that on the evidence the jury could find that, if the gate had been secured as the defendant contended and as described by its general manager, the plaintiff's act in climbing over it in making

his exit from the yard did not contribute to its subsequent fall. The plaintiff's conduct after he was in the street in walking back to the gate where he peered through the opening between the end of the gate and the dry house to ascertain whether his companions were coming from the yard, and his failure to go directly home "because there used to be some dogs in a neighbor's yard, and he stooped down" after taking about six steps from the gate "to look under the neighbor's gate [on the opposite side of the street] to see them," were for the consideration of the jury. It could not have been ruled as matter of law that he acted carelessly. *Dowd v. Tighe*, 209 Mass. 464.

The remaining contention is, that there is no evidence of the defendant's negligence with reference to the condition of the premises, "nor was there evidence of any negligence on the part of any of the defendant's employees while acting within the scope of their employment." The jury, however, thought otherwise, and in answer to the first and second questions found the defendant to have been negligent in the construction or maintenance of the gate, and that the fall of the gate was caused by the negligence of its employee while acting within the scope of his duty. It was undisputed that the gate was maintained and frequently used by the defendant in its "woodworking business," and the jury well could find on all the evidence, that the overhead iron track on which the gate originally was hung had been removed, and the travelling wheels, with the exception of two which were useless, had been taken off. Because of these changes the gate rested upon a roller of wood placed on the ground by the use of which it was opened and closed and, when shut at the time of the accident, the upper part at one end leaned against a shed, the other end being secured and held in an upright position by a rope fastened to an iron hook in the side of the dry house, or to a steel rail running across the passageway. It also appeared that before the accident the gate had been found prostrate and that the defendant's yard foreman had restored it in the position above described.

The defendant on the record was required in so far as travellers on the way were concerned to keep the gate on its own premises. How far its stability or structural strength had been impaired by the changes or by the method of its use, was for the jury, as well as the question, whether the defendant so maintained and managed

the gate as not to endanger the plaintiff while using the way. *Gorham v. Gross*, 125 Mass. 232, 239. *Shepard v. Creamer*, 160 Mass. 496. *Smith v. Edison Electric Illuminating Co.* 198 Mass. 330. *Smith v. Gammino*, 225 Mass. 285.

A further finding was justified that the defendant's yardman, who was following the plaintiff as he climbed over the gate, was seen "fumbling" with the rope when the gate fell, and that after the accident the rope unbroken was found attached to the gate. It would seem to be obvious on the evidence, or at least the jury could so find, that among other duties the yardman had charge of the gate and knew of its dilapidated condition. If with knowledge, or if in the exercise of reasonable care he should have known, of the plaintiff's presence within a few feet of the gate, he unfastened the rope thereby causing its fall, the defendant is responsible for his negligence. *Higgins v. Bickford*, 227 Mass. 52, 54, and cases cited.

We are accordingly of opinion that a verdict for the defendant could not have been ordered, and the exceptions should be overruled.

*So ordered.*

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CHARLES N. SABIN vs. CAMBRIDGE IRON WORKS.

Middlesex. November 20, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence, Proximate cause, Defective hoisting chain. Proximate Cause.*

Evidence tending to show that employees of a corporation undertaking the repair of a boiler for a city used a defective chain to hoist the boiler from a wagon of the city in which it had been driven to the repair shop, that the boiler then was left by them suspended by the chain during the noon luncheon time, that employees of the city removed the bits from the horses' mouths, attached feed bags and left the horses unattended while they went into the boiler room to eat their luncheon, that while the horses thus were unattended the defective chain broke, the boiler fell and the horses, frightened, ran away and came into collision with a motor car, will not warrant a finding that the negligent using of the defective chain was the cause of damage so caused to the motor car, if there is no evidence that the employees of the corporation using the chain knew that the horses of the city had had their bits removed and were left unattended or that they were to remain on the corporation's premises after the boiler had been unloaded.



TORT for damage caused to a motor car of the plaintiff when it was run into by a team of the city of Newton, the horses of which became frightened by the falling of a boiler belonging to the city that had been hoisted from the wagon and was alleged to have been caused to fall by negligence of employees of the defendant in using a defective chain to hoist it. Writ dated March 10, 1917.

In the Superior Court the case was tried before *Hitchcock, J.* At the close of the evidence, the defendant asked the judge to rule that on all the evidence the plaintiff could not recover and that there was no evidence of negligence on the part of the defendant. The judge refused so to rule. The jury found for the plaintiff in the sum of \$130; and the defendant alleged exceptions.

*S. M. Child*, for the defendant.

*G. A. Kearsley*, for the plaintiff.

CARROLL, J. This is an action of tort for damages to the plaintiff's automobile which was run into, while standing on a public street, by a team owned by the city of Newton. A boiler belonging to the city of Newton was loaded on a four-horse wagon in charge of two employees of the city and was taken to the defendant's place of business to be repaired. A chain was wrapped round the boiler and it was hoisted from the wagon by a crane, under the direction of the defendant's superintendent. The bits were then taken from the horses' mouths and feed bags put on by the city's employees before going to the boiler room "to eat their lunch." They were in the boiler room about five or ten minutes when the chain broke and the boiler fell to the ground with a loud noise which, it is claimed, caused the horses to run away. There was a verdict for the plaintiff.

Assuming that it could have been found, by the breaking of the chain, that it was defective or unsuitable for the purpose for which it was used, — see, in this connection, *Poole v. Boston & Maine Railroad*, 216 Mass. 12, 16, 17; *Chiuccariello v. Campbell*, 210 Mass. 532, 535; *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, — this fact in and of itself does not show that the defendant's negligence contributed to the plaintiff's injury. There is nothing in the record to show that the defendant's agents knew the horses were to remain on the premises after the boiler was unloaded; nor is there any evidence of the presence of the defendant's servants

when the bits were removed and the feed bags placed on the horses or when the men in charge left them unfastened with no one in control of them; and from the record we must assume that the defendant did not know the horses were unfastened and unattended, or, in fact, that they were in its yard or on its premises. Under these circumstances the defendant could not be held to have reasonably anticipated that the falling of the boiler would cause the horses to run away and injure the plaintiff's property.

*Exceptions sustained.*

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ISIDOR MOSS *vs.* MAXWELL COPELOF & another.

Suffolk. November 20, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Evidence, Presumptions and burden of proof. Contract, Validity. Bills and Notes. Corporation, Officers, Directors.*

Where in a bill of exceptions in an action of contract it was stated as a material fact, that the plaintiff was elected president of a Massachusetts business corporation, it was taken, in the absence of any statement to the contrary, that the plaintiff was elected as such president under St. 1903, c. 437, § 18, and therefore that he was elected for the term of one year.

In an action of contract on certain promissory notes the defence was set up that the notes were void because given in pursuance of an unlawful agreement. It appeared that the notes were given by the two defendants to the plaintiff in pursuance of a contract in writing between the three, that the three were directors of a business corporation, of which they owned a majority of the stock, that the plaintiff was the president of the corporation and received from the corporation a salary of \$150 a week either for his services as president or otherwise, that by the contract the plaintiff agreed to terminate his employment by the corporation on a day named, which was thirteen days from the date of the contract, and it was provided that "Upon said termination [the plaintiff] shall be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said [corporation] for unpaid stock subscription." This contract was not made nor authorized at a meeting of the directors and was not submitted to the stockholders at a meeting or otherwise. It could have been found that nothing could be due to the plaintiff at the time that he was to terminate his employment. The presiding judge ordered a verdict for the plaintiff. *Held*, that the ordering of the verdict was wrong and that the case should have been submitted to the jury, who could have found that the contract between the parties was to pay the plaintiff \$600 from the funds of the corporation, when nothing was due to him, and to apply this amount on account of his indebtedness "for unpaid stock sub-

scription," which would make the contract unlawful and void and in violation of St. 1903, c. 437, § 14.

No action can be maintained between the parties to a promissory note which was given pursuant to the provisions of an unlawful contract.

CONTRACT on three promissory notes, signed by the defendants as makers and payable to the plaintiff, each for \$40, dated respectively July 21, July 28 and August 4, 1917, and payable respectively on January 21, January 28 and February 4, 1918. Writ in the Municipal Court of the City of Boston dated February 8, 1918.

The defendants' answer, besides other matters, alleged "that, if the plaintiff offers evidence tending to show that the defendants made the notes set forth in the plaintiff's declaration, then the defendants say that said notes were made in pursuance of an illegal agreement and that said notes are therefore null and void."

On removal to the Superior Court the case was tried before *King, J.* The evidence is described in the opinion. The agreement in writing, there referred to and quoted in part, was in full as follows:

"Agreement entered into this nineteenth day of December, A. D. 1916, by and between Maxwell Copelof and Morris M. Roud, both of Boston, Massachusetts, (parties of the first part), and Isidor Moss of Brookline, Massachusetts, (party of the second part) Witnesseth:

"Whereas said parties at the present time are officers and stockholders of the M. & C. Skirt Company, a Massachusetts corporation, and

"Whereas said parties desire to leave the management and control of said corporation in the hands of the parties of the first part.

"Now therefore the said parties hereto agree as follows:

"First: Said party of the second part is to terminate his employment with said M. & C. Skirt Company on January 1, 1917.

"Second: Upon said termination said party of the second part shall be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said M. & C. Skirt Company for unpaid stock subscription.

"Third: Said parties of the first part will pay said party of the second part on Saturday of each week for a period of six months beginning January 1, 1917, the sum of One hundred and twenty-five (125) dollars.

"Fourth: Beginning with July 1, 1917, said parties of the first part will advance to said party of the second part for a period of six months from said date the sum of One hundred and twenty-five (125) dollars each week, payable Saturday, and for said advances they shall have a lien either upon the dividends declared on the present stockholders of the said party of the second part in said M. & C. Skirt Company, or upon the stock itself, if the dividends declared shall be insufficient to re-pay such advances.

"Fifth: During the year 1917 said parties of the first part agree not to increase their present salaries, and during said year, and thereafter not to do any act or thing to benefit their stockholdings or derive any benefit therefrom at the expense of the holdings of said party of the second part, without first giving said party of the second part an opportunity to share in said benefits.

"Sixth: Said parties of the first part shall have the privilege in their discretion, if they so desire, to do, to cause said M. & C. Skirt Company to make said advances described in said paragraph four upon the terms therein stated.

"Seventh: Except as stipulated in said sixth paragraph, the agreements herein contained shall be binding upon and be for the benefit only of the parties herein named.

"In witness whereof said parties have signed their names to this agreement in triplicate this day and year first above written.

Morris M. Roud

Isidor Moss

Maxwell Copelof."

At the close of the evidence the judge, at the request of the plaintiff, ordered the jury to return a verdict for the plaintiff for the amount of the notes and interest. The jury accordingly found for the plaintiff in the sum of \$121.69; and the defendants alleged exceptions.

*H. Bergson*, for the defendants, submitted a brief.

*P. Rubenstein*, for the plaintiff.

LORING, J. This is an action on three notes each signed by the defendants. They admitted the execution of the notes and set up (*inter alia*) the defence of illegality. The presiding judge directed the jury to return a verdict for the plaintiff and the case is here on an exception taken to that ruling.

The evidence was in substance as follows: The notes were made

and delivered pursuant to a written agreement between the plaintiff and the defendants dated December 19, 1916. The plaintiff and the defendants (there are two of them) were the directors of the M. & C. Skirt Company, a Massachusetts corporation, and they owned a majority of the stock of that corporation. In addition the plaintiff was the president of the company. There was evidence "that there were quite a few other stockholders." The plaintiff testified "that he was employed by the corporation and received a salary of \$150 per week;" and "that some time in the fall of 1916 he had some difference of opinion with the defendants about his remaining in active connection with the corporation . . . and that the plaintiff and the defendants discussed the question of having the plaintiff sever his connection with the company, and that as a result of the discussion the parties entered into" the written agreement of December 19, 1916. This agreement provided (1) that the plaintiff was "to terminate his employment" on January 1, 1917, (2) that on terminating his employment the plaintiff was to "be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said M. & C. Skirt Company for unpaid stock subscription" (3) that the defendants would pay him \$125 a week for the six months next after January 1, 1917, (4) that during the six months beginning July 1, 1917, the defendants would advance to him \$125 a week to be secured by the plaintiff's stock in the corporation, (5) that during the year 1917 the defendants would not "increase their present salaries, and during said year, and thereafter not to do any act or thing to benefit their stockholdings or derive any benefit therefrom at the expense of the holdings of said party of the second part, without first giving said party of the second part an opportunity to share in said benefits," and (6) the defendants should "have the privilege in their discretion, if they so desire, to do, to cause said M. & C. Skirt Company to make said advances described in said paragraph four upon the terms therein stated."

The plaintiff testified that when the time came for the advances to be made he agreed to take \$45 a week in cash and \$80 in two notes of \$40 each signed by the defendants one note to be payable in six months and the other in a year. The first two six months' notes so given were paid when due. The notes sued on were the

third, fourth and fifth six months' notes given pursuant to the subsequent modification (stated above) of the fourth clause of the agreement of December, 1916. When the time came for the delivery of the sixth lot of two notes there was a dispute as to the collateral to be given by the plaintiff. Thereupon the defendants refused to make further advances. They also refused to pay the three notes here in question and this action was brought.

The plaintiff's main answer to the defence of illegality is that by the true construction of article 1 of the contract of December 19 the \$600 there specified was to be paid to the plaintiff by the defendants and by him applied in payment of his unpaid subscription to the capital stock of the corporation. We cannot accede to that contention. The provision made by the article is that the plaintiff "shall be credited" with \$600 not that he shall be paid \$600. That means "credited" by the corporation.

It must be taken that the plaintiff was elected president of the corporation under St. 1903, c. 437, § 18. It follows that when elected he was elected for the period of one year. But it did not appear when he was elected and so it did not appear when the period of one year (for which he was elected) began to run. For all that appeared his election as president may have taken place December 20, 1915, and consequently there may have been but one day of his unexpired term left when the agreement of December 19, 1916, was made. It did not appear that the \$150 per week which the plaintiff testified was the "salary" he was receiving from the corporation was paid to him as president. The plaintiff in his testimony went no further than to state that he "received a salary of \$150 per week." Doubtless the jury could have found on this evidence that this salary of \$150 per week was received by him for his services as president. But we are not concerned with that. What we are concerned with is that on the evidence the jury were not bound to find that the plaintiff was entitled to receive anything from the corporation on January 1, 1917. If it be assumed that, being employed by the week, he could not be discharged without a week's notice and in the absence of such a notice without payment of a week's salary (*Frati v. Jannini*, 226 Mass. 430), he had more than a week's notice; for the contract was made on December 19, 1916, and he was to "terminate his employment" on January 1, 1917.

Putting at the highest the case made out by the plaintiff as matter of law, the notes sued on were given pursuant to a contract by which the plaintiff and the defendants (being all the directors of the corporation) agreed among themselves that the plaintiff should be paid \$600 out of the funds of the corporation when the jury were warranted in finding that nothing was due to him. We have said that the plaintiff and the defendants agreed among themselves because there is no pretence that this agreement was made at a meeting of the directors and it affirmatively appeared that it was not submitted to a meeting of the stockholders nor indeed to the stockholders outside of a stockholders' meeting. This result is not affected by the plaintiff's testimony "that some time in the fall of 1916 he had some difference of opinion with the defendants about his remaining in active connection with the corporation." In the first place the jury were not bound to believe that testimony. But, if that testimony is to be taken to be true, it does not as matter of law require a finding that the agreement to pay the plaintiff \$600 when nothing was due him for his services was an honest agreement. It may be that this testimony would have warranted a finding that the agreement was an honest one. But that is not of consequence. What is of consequence is that the jury were warranted in finding that this agreement was a dishonest one in spite of this testimony.

The payment of \$600 out of the funds of the corporation when nothing was due to the plaintiff (if the jury found that to be the fact) would have been a fraud upon the stockholders and the agreement that the \$600 should "be applied on account of his indebtedness . . . for unpaid stock subscriptions" would have been in violation of St. 1903, c. 437, § 14. If so, the whole contract would have been an illegal one. See, for example, *Palmbaum v. Magulsky*, 217 Mass. 306. It follows that the notes sued on given pursuant to its provisions would have been illegal also and this is a defence which can be set up in an action between the parties to the notes.

We have not found it necessary to consider the true construction of the sixth clause of the agreement, since we are of opinion (for the reasons stated) that the jury were warranted in finding that the agreement was an illegal one quite apart from that provision of the contract.

*Exceptions sustained.*

MARY J. BURNS, administratrix, vs. OLIVER WHYTE COMPANY,  
INCORPORATED.

Middlesex. November 20, 25, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence, Contributory, Causing death, In use of highway.*

At the trial of an action by the administratrix of the estate of a teamster for causing the death of the plaintiff's intestate by running over him with a motor truck after the enactment of St. 1914, c. 553, there was evidence that, at the time when he was run into, the teamster, having loaded a wagon with crushed stone in the yard of a contractor, with his back to a public way was leading the horses of the team by the bridles, because they were restless, from weighing scales into the street; that just as he, at the horses' heads, had about reached the nearer gutter of the public way, he was struck by the motor truck, which was approaching from his right without warning and at the rate of about twenty miles an hour and was "hugging" the gutter on that, its right, side of the way, that he was pulled from the horses, turned around, and was caused to fall under the right hand rear wheel of the truck and was killed. *Held*, that the evidence did not warrant a ruling that the burden of proving contributory negligence, placed on the defendant by St. 1914, c. 553, had been sustained, and that a finding that the plaintiff's intestate was in the exercise of due care was warranted.

At the trial of the action above described, there was further evidence that the day was clear, that the driver of the defendant's motor truck had a clear view of the plaintiff's intestate for from five hundred to six hundred feet, that the truck was running at a speed of twenty miles an hour and that no warning was given of its approach, and it was *held* that a finding that the defendant's driver was negligent was warranted.

TORT, by the administratrix of the estate of Edward L. Kelley, for his conscious suffering and death alleged to have been caused by negligence of employees of the defendant in running over him with a motor truck on Mystic Avenue in Somerville on November 21, 1916. Writ dated March 5, 1917.

In the Superior Court the case was tried before *J. F. Brown, J.* A verdict was ordered for the defendant on the count for conscious suffering. At the close of the evidence the defendant moved for a verdict on the count for causing death on the ground that on all the evidence the plaintiff was not entitled to recover. The motion was denied. The jury found for the plaintiff on that count in the sum of \$6,833. The defendant alleged exceptions.



*H. S. Avery*, for the defendant, submitted a brief.

*R. W. Frost*, for the plaintiff.

BRALEY, J. The action is tort for conscious suffering and death of the plaintiff's intestate who was struck and instantly killed by a motor truck operated by an employee of the defendant. A verdict for the defendant was ordered on the count for conscious suffering, but, the jury having found for the plaintiff on the count for death, the case is before us on the defendant's exceptions to the refusal of the trial judge to rule that on all the evidence the plaintiff as matter of law was not entitled to recover.

The jury on the record would have been warranted in finding the following facts: The plaintiff's intestate, a teamster, had driven his double team into the yard of a firm of contractors who were engaged in crushing stone, and had stopped under the hopper of the crusher where his wagon was loaded with crushed stone. He then drove on to the scales located in the contractors' yard off the side of the public way to have the load weighed. The crusher was in operation and as the horses started off the platform of the scales they appeared to be restless and the intestate thereupon while standing on the ground "got hold of his pair of bridles, one in each hand" and began walking backward toward the public way, leading the horses forward, and as "he got out just about in the gutter" the motor truck came down "hugging" the edge of the gutter on that same side of the street and, without hitting the horses, "picked him right off the end of the pole," "turned him under the truck, and the right hind wheel went over his head."

It is contended there was no evidence of his due care. The count for death is under R. L. c. 171, § 2, as amended by St. 1907, c. 375, under which it has been uniformly held that evidence must be introduced that the intestate was "actively and actually" in the exercise of due diligence at the time of the injury and that proof of the absence of fault is insufficient. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467. But in all of these cases the accident happened before the enactment of St. 1914, c. 553. It was said in *Mercier v. Union Street Railway*, 230 Mass. 397, 404, "It is not necessary to determine whether St. 1914, c. 553, § 2, has made any change in the degree of care required in cases arising under the penalty

death statutes. If it be assumed that the rule of *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, remains unaffected, the presumption as to due care raised by the first section of the statute is co-extensive with the requirements of that rule, for it expressly is made applicable to actions or indictments for the recovery of damages for causing death." The section referred to in so far as material in the present case reads: "In all actions, civil or criminal, . . . the person . . . killed shall be presumed to have been in the exercise of due care, and contributory negligence on his or her part shall be an affirmative defence to be set up in the answer of, and proved by the defendant." And in *Bullard v. Boston Elevated Railway*, 226 Mass. 262, 267, it was said: "These provisions are explicit to the effect that the due care of 'the person injured or killed' shall be presumed and that contributory negligence 'on his or her part' shall be an affirmative defence." The burden therefore is shifted by the statute and the defendant must show contributory negligence by a greater amount of credible evidence. *Duggan v. Bay State Street Railway*, 230 Mass. 370, 379. It was said in the case just cited that "It is only in comparatively rare instances that it can be ruled as matter of law that a burden of proof depending upon oral testimony has been sustained."

It does not appear whether the intestate looked in the direction from which the truck came before taking his position, but as he stood at the head of the horses he was lawfully upon the highway and had the right to assume that he would not be run into, and how far his failure to look either forward or backward evinced carelessness was for the jury.

In *Murphy v. Worcester Consolidated Street Railway*, 225 Mass. 264, the plaintiff's intestate with a full unobstructed view of the car track was driving a slowly moving disc harrow drawn by a pair of horses down a side street. As he came on to the main street he was struck and killed by the defendant's car. It was held that the question of his due care was one of fact.

In *Bailey v. Worcester Consolidated Street Railway*, 228 Mass. 477, the plaintiff in operating his car with only one of the side lights burning was violating the law of the road. Yet the court say that, it could not have been ruled as matter of law that the presumption given to him by the statute had been entirely overcome.

And in *Callahan v. Boston Elevated Railway*, 205 Mass. 422,

where the plaintiff was injured by being run into from behind while driving a two-horse caravan in the street, and in *Emery v. Miller*, 231 Mass. 243, where the plaintiffs who were pedestrians were run into by the defendant's automobile, approaching them in the rear, it was held that a failure of the injured parties to look backward was insufficient to bar recovery.

While the defendant also contends that there was no evidence of its negligence, the jury could find that on a clear day, with the intestate in plain sight for a distance of from five hundred to six hundred feet, the motor truck running at a speed of twenty miles an hour on the extreme edge of the street and without giving any warning of its approach came into collision with the intestate. It is settled that whether under such conditions the driver used due care was a question of fact. *Hennessey v. Taylor*, 189 Mass. 583. *Murphy v. Worcester Consolidated Street Railway*, 225 Mass. 264, and cases there cited.

*Exceptions overruled.*

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AMERICAN BROACHING MACHINE COMPANY & another vs. MEMBERS  
OF THE MARLBOROUGH BOARD OF TRADE & others.

Suffolk. November 21, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Equity Jurisdiction*, Accounting, To restrain action at law, To avoid circuity of action and multiplicity of suits.

A manufacturer, seeking a site for a factory for a corporation which he contemplated organizing, interviewed the board of trade of a municipality in this Commonwealth, a voluntary organization composed of many members, and the board through its officers agreed with him in writing that they would procure for him and the corporation a building site and would build a factory thereon, for which the corporation should pay sixty per cent in its notes secured by a mortgage and forty per cent in its preferred stock. This agreement afterwards was modified to the effect that the title to the land should be taken by the corporation. The corporation was formed and made an agreement with a building corporation to purchase certain land agreed upon, payments under the agreement to be refunded and all obligations thereunder to cease if the building corporation was unable to pass a good title. Certain members of the board of trade, who also were officers and chief shareholders of the building corporation, knew that the title was defective. The manufacturer, not knowing so, with his corporation

went to great expense on the assurance of the board of trade that all would be well. The secretary of the board of trade directed a contractor to go ahead with preparations for the building. The title proved defective and loans upon it could not be placed, and the contract could not be carried out. The building corporation brought three actions at law against the manufacturer and his corporation upon the agreement signed by the two corporations. The contractor threatened suit against the plaintiff and his corporation. The plaintiff and his corporation brought a bill in equity against the members of the board of trade, the building corporation and the contractor, alleging the foregoing facts and seeking a determination of the validity of the contentions of the various parties, accountings between and among all parties, a restraining of the actions at law begun and threatened against the plaintiffs, and discovery of the facts as to the contract between the board of trade and the contractor. *Held*, that adequate and complete remedies were afforded at law, and that there was no jurisdiction in equity upon the facts alleged.

**BILL IN EQUITY**, filed in the Superior Court on April 17, 1918, and afterwards amended, by the American Broaching Machine Company, a Massachusetts corporation, and Francis J. LaPointe against persons denominated as officers and members of certain committees and certain individual members of the Marlborough Board of Trade, a voluntary association averred in an amendment to the bill to be composed of numerous members but few of whom were known to the plaintiff, the Marlborough Building Association, a Massachusetts corporation, and one Charles McGee.

The allegations of the bill as amended in substance were that the plaintiff LaPointe, seeking a location for a factory for a corporation which he proposed organizing, visited the board of trade of Marlborough; that there were negotiations with them, some in writing, which are described in the opinion and which the plaintiffs averred constituted a contract in writing to the effect that the board of trade should acquire land and build a factory for the corporation to be formed by the plaintiffs, and should take in payment therefor a mortgage of sixty per cent of the cost of the land and building, the remainder of the cost to be paid for in preferred stock of the corporation to be issued to the board of trade; that later, on representations of the defendants Howe and Gage that it was necessary to modify the arrangements because the board of trade, being a voluntary association, could not take the mortgage, it was agreed that LaPointe's corporation, when formed, should take the title and should make application for the mortgage which the board of trade would place. The plaintiff corporation accordingly was formed

and the agreement for the purchase of the land, described in the opinion, was made between it and the defendant Marlborough Building Association, of which Howe was the president and chief shareholder, and the defendant Fletcher, a member of the board of trade, was treasurer, Howe and Fletcher knowing that the title to the land was defective.

It was averred further that the secretary of the board of trade, without the consent of the plaintiffs, before the time for the passing of the papers directed the defendant McGee to proceed with preparations for the building of the factory.

The averments of the bill as to the failure of the title are described in the opinion.

The plaintiffs averred further that the defendant Marlborough Building Association had brought three actions at law, each against both of the plaintiffs upon the contract in writing between it and the plaintiff corporation and that the defendant McGee was about to bring an action at law against the plaintiffs for compensation for his labor and materials. Damages caused to the plaintiffs by reason of the failure of the board of trade to carry out their agreement were specifically described.

The plaintiffs alleged that the plaintiff LaPointe sought no damages as an individual, but joined as a plaintiff in order that he might be bound by any decree.

There also were in the amended bill, besides the allegations as to a trust and as to the accountings sought by the plaintiffs, described in the opinion, allegations stating that the plaintiffs sought the jurisdiction of the court to avoid "circuity of actions and multiplicity of suits." There also were allegations that discovery was necessary in order to ascertain the provisions of the contracts between the defendants, members of the board of trade, and McGee.

All the defendants excepting McGee demurred to the original bill and to the bill as amended. Successive demurrers were heard by *Jenney, J.*, and by *J. F. Brown, J.*, respectively, and were sustained. A final decree was entered dismissing the bill. The plaintiffs appealed.

*H. J. Jaquith*, for the plaintiffs, submitted a brief.

*R. H. Beaudreau*, (*J. J. Shaughnessy* with him,) for all the defendants except McGee.

CARROLL, J. The plaintiff LaPointe alleges that he was looking for a factory site in Marlborough and conferred with members of the board of trade of that city. On October 10, 1917, the board of trade made an offer in writing to purchase a suitable site in Marlborough and erect a building, provided LaPointe would form a corporation and purchase at its par value \$20,000 of the common stock. Frank L. Gage and Sumner C. Gage were to purchase common stock at par to the extent of \$2,000, on condition that Sumner C. Gage should become the treasurer of the corporation. This offer was rejected by LaPointe. In answer to his letter Frank L. Gage said, "eliminate us from the agreement and we, with the Board of Trade will stand by the rest of the agreement;" and closed by saying, "We shall be glad to see you at your earliest convenience and receive your word to go ahead on the lines desired by you." It is also alleged that a contract in writing was made November 3, 1917, between the plaintiff the American Broaching Machine Company, a corporation which was organized November 7, 1917, and the defendant Marlborough Building Association of Massachusetts, a corporation, by which the building association was to build and the machine company was to purchase certain real estate to be conveyed to it on or before November 15, 1917, by a "good and sufficient *Warranty deed*." The purchase price was \$1,500. One hundred dollars was paid on the date of the agreement, and on the day of delivery of the deed. "*Nine hundred* × 100 dollars are to be paid in cash . . . and the remainder is to be paid" in preferred stock of the American Broaching Machine Company. The agreement stipulated that, if the building association was unable to give title, "payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease." Later, on November 14, 1917, the time for performance was extended to December 1, 1917. It is further stated that the defendant Gage agreed with the defendant McGee to construct the building, which agreement, the plaintiffs allege, was not assented to by them.

About November 9, 1917, it was found that the title was imperfect. In one paragraph there is an averment that the defendants Howe and Fletcher knew that the title was defective and "they colluded with the board of trade's officers in an attempt to fraudulently work off a bad title" on the plaintiffs. There is also an

averment that the plaintiffs were put to expense and the members of the board of trade "conspired to intimidate and oppress the plaintiffs," by bringing two actions of law against them; that the members of the board of trade have "denied any employment of the defendant Charles McGee;" and that McGee "has informed the plaintiffs that he is about to bring an action at law against them." The bill also prays for an accounting under the offer of October 10, 1917, the letter to Gage, and his reply; that the damages, if any, due the Marlborough Building Association be established and ordered paid; that damages due the defendant McGee and the plaintiffs' damages caused by the board of trade be paid; that the amount due "McGee or Marlborough Building Association, or plaintiffs," shall be determined, and the "proportion of contribution of each." There is also a prayer for an injunction restraining the prosecution of the action at law.

There were several amendments to the bill, — one alleging that the agreement of sale of November 3 "constituted a trust for the benefit of the defendant board of trade;" by another, LaPointe made no claim for damages as an individual and "No remedy is sought in this action for the fraud and conspiracy which has been set out merely as inducement to show the need of equitable relief." In the Superior Court all the defendants, except McGee, demurred; the demurrers were sustained and a decree was entered dismissing the plaintiffs' bill.

The negotiations with the Marlborough Board of Trade contemplated the securing of a factory site for LaPointe and the corporation he was to organize. The result of these negotiations was the contract between the American Broaching Machine Company and the Marlborough Building Association. LaPointe does not now ask compensation in damages; and even if it be assumed that the American Broaching Machine Company has any claim against the members of the Marlborough Board of Trade, it has a plain, adequate and complete remedy at law and cannot ask for relief in equity. If the contract between the American Broaching Machine Company and the Marlborough Building Association was broken by the latter, the former can settle all its rights by an action at law and there is no reason why it should resort to a court of equity. The averment that the contract between the two corporations "constituted a trust for the benefit of the defendant

board of trade," is insufficient to establish a right to equitable relief.

If the contractor McGee brings an action at law against the plaintiff corporation, we see no reason why it cannot fully and completely protect its rights in such an action. See *McNeil v. Ames*, 120 Mass. 481, 486. No reason is shown for restraining the Marlborough Building Association from prosecuting the actions at law.

Without considering whether the bill is multifarious, it is enough to say that no error of law appears. The plaintiffs have a full, adequate and complete remedy at law, and the demurrers were sustained properly.

*Decree dismissing the bill affirmed with costs.*

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### CONGREGATION BETH ISRAEL vs. JACOB S. HELLER.

Suffolk. November 21, December 4, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Way, Private. Trespass. Equity Jurisdiction.* To enjoin trespass, Mandatory injunction.

The owner of the fee of land used as a private way, which he holds under a deed providing that the way is to be forever used as a passageway by him in common with owners and occupants of the land abutting thereon, may maintain a suit in equity against another owner of land abutting on the way, whose deed provides that he shall have "a free and uninterrupted right, use and privilege in" the way, and who has made an excavation in the way and has constructed a bulkhead there, such acts of the defendant being without excuse; and in such suit a mandatory injunction may be issued directing the defendant to restore the way to the condition in which it was before he committed the trespass.

The maintenance of such a suit is not precluded by the mere facts that other abutting owners placed in the way coal holes with covers and gratings for lighting cellars, nor by the fact, if it is a fact, that the defendant had a right to lay water pipes in the way.

The owner of an easement in land is entitled to a mandatory injunction compelling the removal of structures that violate his right, although he has suffered no pecuniary damage.

BILL IN EQUITY, filed in the Superior Court on November 16, 1917, and afterwards amended, for a mandatory injunction restraining the defendant from making an excavation in Baldwin



Place in Boston, the fee to which was owned by the plaintiff subject to a right in the defendant to "a free and uninterrupted right, use and privilege" therein.

The suit was referred to a master, who found the facts described in the opinion. After a hearing by *Wait*, J., a decree was entered granting the injunction prayed for. The defendant appealed.

*J. F. Warren & H. A. Palmer*, for the defendant, submitted a brief.

*N. A. Heller*, for the plaintiff.

*Rugg*, C. J. The findings of fact made by the master must be accepted, since the evidence is not reported.

The plaintiff at and before the acts complained of was the owner of the fee of a private way in Boston known as Baldwin Place, together with a tract of land abutting thereon, on which was located its synagogue. It was provided by deed that Baldwin Place is to be forever used as a passageway by the plaintiff in common with owners and occupants of other land abutting thereon. On each side throughout its length the plaintiff, about ten years ago, constructed a smooth granolithic sidewalk six feet wide. These walks are much used by those who gather at the plaintiff's synagogue. The defendant is the owner of a tract of land with building thereon, abutting partly on Baldwin Place, and as appurtenant to his estate has by deed "a free and uninterrupted right, use and privilege in" Baldwin Place. For the purpose of providing an entrance to the basement of his building, the defendant made an excavation and constructed a bulkhead in the sidewalk on Baldwin Place. It is to prevent the maintenance of this bulkhead and to compel restoration of Baldwin Place to its former state that this suit is brought.

There is no excuse on this record for the acts of the defendant. He had no title to the fee of Baldwin Place. He had only a bare easement to use it as a passageway. He had no justification whatever for interference with rights of the owner of the fee by excavating or maintaining a bulkhead to be used in connection with his basement. The facts that in Baldwin Place there are coal holes with covers, that four or five houses have flights of two or three wooden steps, all within the property lines, leading to passageways to back yards, and that there are several instances where cellar windows are lighted from gratings in the sidewalk, afford

no warrant for the conduct of the defendant. The circumstances under which these were constructed and maintained do not appear. Even if it be assumed in favor of the defendant, but without so deciding, that he has a right to lay water pipes in Baldwin Place, that confers no pretext for the construction or maintenance of a bulkhead. The conduct of the defendant was a pure trespass without an extenuating feature.

It is of no consequence that the acts of the defendant have caused no pecuniary damage to the plaintiff. His conduct is an invasion of its title to real estate, and that is enough to enable it to secure relief by mandatory injunction for removal of his constructions under well recognized principles. The case is within the authority of numerous decisions. *Harrington v. McCarthy*, 169 Mass. 492. *Curtis Manuf. Co. v. Spencer Wire Co.* 203 Mass. 448. *Kershishian v. Johnson*, 210 Mass. 135. *Szathmary v. Boston & Albany Railroad*, 214 Mass. 42. *Zimmerman v. Finkelstein*, 230 Mass. 17.

*Decree affirmed with costs.*

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MARY CASEY, administratrix, vs. BOSTON AND MAINE  
RAILROAD.

Worcester. November 22, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence*, Federal employers' liability act, Railroad, Proximate cause. *Proximate Cause*. *Evidence*, Relevancy and materiality, Statements to Industrial Accident Board, Self-serving statements, Admissions.

At the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, there was evidence tending to show that rules of the defendant required the firemen upon its engines to keep a constant lookout when not firing and to be on the watch, if the engineman was obliged to look away from the track in front, until he could resume his lookout, to give instant notice to the engineman of any signals or indications of danger or of obstructions and to arrange the work so that fires would not need attention and that no other duties would interfere with their lookout when approaching stations or crossings. It appeared that when killed the plaintiff's intestate was inspecting a dwarf signal by a track near a station, and that he was struck by a freight train which emerged from under a bridge under which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet. The fireman was not in his customary seat keeping a lookout, but was in the gangway

between the engine and the tender. *Held*, that there was no evidence that negligence on the part of the fireman caused the death of the plaintiff's intestate, since, if he had been on watch he could not have seen the plaintiff's intestate in time to prevent the accident.

For the same reason it was *held* that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to."

At the trial of the action above described there was evidence upon which the jury were warranted in finding that there was a custom among enginemen of the defendant, if they saw any one on the track, to sound the whistle, or, if the road could not be seen ahead, to "shut off steam and slow down," and that it was the engineman's duty to blow the whistle if he saw a man ahead or if he had reason to believe that a man was ahead who did not know of the train's approach. There was no evidence that the defendant had promulgated such a rule. *Held*, that there was no evidence warranting a finding that negligence of the engineman caused the death of the plaintiff's intestate.

At the same trial a witness testified that when the accident happened the train was late and was running "very much faster" than the witness "ever saw it go before." *Held*, that this evidence would not warrant a finding that the train was running at an excessive rate of speed.

An engineman of a freight train has a right, in the operation of his engine, to assume that signal men of his employer who are thoroughly familiar with the location of the tracks and the movements of both freight and passenger trains will take reasonable precautions to ensure their own safety.

It appeared that the defendant in the action above described, in accordance with St. 1911, c. 751, Part III, § 18, (as amended by St. 1913, c. 746, § 1,) made a report of the accident in which, on a blank furnished for the purpose, opposite the words "Describe fully how injury occurred," it stated "While attending to dwarf switches was struck by train and killed." This statement was introduced in evidence by the plaintiff. The defendant, subject to an exception by the plaintiff, thereupon was permitted to introduce in evidence a statement later filed with the board by the defendant as to the same accident and stating, opposite the same words, "Correct cause of accident is given as follows: Was undoubtedly running for a train and was struck by unknown train on other track." *Held*, that both reports properly were treated as one entire report filed in compliance with the statutes and that no error was shown.

It also was *held* that the statement in the second report, quoted above, was not an admission of negligence by the defendant, and was not to be excluded as a self-serving statement.

TORT, by the administratrix of the estate of Thomas Casey against a railroad corporation, under the federal employers' liability act, U. S. St. of April 22, 1908, c. 149, as amended by U. S. St. of April 5, 1910, c. 143, for causing the death of the plaintiff's intestate while employed by the defendant as a signal foreman of its block signal system and engaged in the

discharge of his duties near the defendant's station at Cambridge. Writ dated May 24, 1916.

In the Superior Court the case was tried before *Sanderson, J.* The first report by the defendant to the Industrial Accident Board of the accident in which the plaintiff's intestate was killed, referred to in the opinion, was dated June 5, 1914, and was introduced in evidence by the plaintiff subject to an exception by the defendant. After the words "Describe fully how injury occurred," it contained the words, "While attending to dwarf switches was struck by train and killed." Subsequently there was read to the jury at the request of the defendant and subject to an exception by the plaintiff the statement in a report to the Industrial Accident Board by the defendant on the same form as to the same accident dated June 10, 1914, where, after the words "Describe fully how injury occurred," the defendant stated, "Correct cause of accident is given as follows: Was undoubtedly running for a train and was struck by unknown train on other track." Other material evidence and the exceptions of the defendant are described in the opinion.

Upon a motion by the defendant at the close of the evidence, the judge ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

*J. M. Hoy & M. F. O'Connell*, for the plaintiff.

*C. M. Thayer, F. C. Smith, Jr., & G. A. Gaskill*, for the defendant.

**BRALEY, J.** The plaintiff's intestate was employed by the defendant as a divisional or signal foreman of its block signal system. It was his duty within the territory assigned to him to supervise the maintenance of signals, for the proper operation of which he was personally responsible, and the jury upon conflicting evidence as to his movements could find, that while on the ground inspecting a "dwarf signal," or while on the track, he was struck by a passing freight train and instantly killed. The action is brought under the federal employers' liability act to recover damages for his death, and, a verdict having been ordered for the defendant, the case is here on exceptions to the order and to the exclusion and admission of evidence.

If it be assumed there was evidence that when killed he was engaged in interstate commerce, we are of opinion that on the

record there can be no recovery unless there is evidence which would have warranted the jury in finding that his death was caused "in whole or in part" by the negligence of his fellow employees. U. S. St. of April 5, 1910, c. 143. *Cruzan v. New York Central & Hudson River Railroad*, 227 Mass. 594. *Clapp v. New York, New Haven, & Hartford Railroad*, 229 Mass. 532. The negligence which is relied on is the failure of the fireman or of the engineman, or of the head brakeman who rode on the engine, to observe the intestate, and to warn him of his danger, or to reduce the speed, or to stop the train and avoid a collision.

It appears from the rules put in evidence relating to firemen that, "While engine is moving they will keep a constant lookout when not firing, and be on watch if the engineman is obliged to look away from the track in front until he can resume his lookout; — they must give instant notice to the engineman of any signals or indications of danger or obstruction, or if there is any reason to believe that train has struck any person or object on the track." "They must observe trains on other tracks to see whether they are carrying signals. They must observe their markers frequently and see that train is complete and in good order. They must arrange their work, especially on passenger trains, so that fires will not need attention and that no other duties will interfere with their lookout when approaching stations or crossings." The rules relating to whistling signals on approaching stations, junctions and railroad crossings at yards, and that a succession of short sounds of the whistle is an alarm for persons or cattle on the track, and that enginemen and firemen shall be on the lookout when engine or trains are approaching stations or crossings, and the enginemen are responsible for the speed of their trains also were introduced.

It is plain, however, that these rules are designed for the safe management and operation of the train and do not purport to be for the benefit or protection of track and signal men. *Sullivan v. Fitchburg Railroad*, 161 Mass. 125. *Porter v. New York, New Haven, & Hartford Railroad*, 210 Mass. 271, 274. *Cruzan v. New York Central & Hudson River Railroad*, 227 Mass. 594.

The fireman, engineman, and head brakeman were riding on the engine when the accident happened. The road consisted of four main tracks, and the uncontradicted evidence shows that a short

distance from the dwarf signal there was an overhead foot-bridge where the curvature was such that enginemen approaching the bridge from either direction were unable to obtain a full view of the tracks on the opposite side. A passenger train going east had just passed leaving in its wake a dense cloud of smoke and steam which completely overhung the tracks, into which the engine of the freight train going west entered as it came round the curve under the bridge. The fact that the fireman was not in his customary seat but stood in the gangway between the engine and the tender is of no consequence. Even if he had been seated and had failed to look out ahead, "the smoke and steam were so cloudy that you could not see anything ahead of you for a distance of twenty feet" when it would have been too late to have given any effective warning or to have stopped, or even so to have reduced the speed as to avoid the accident.

What has been said applies as well to the head brakeman who was sitting on the fireman's seat, and whose duties as described by him, "were to be looking out ahead and to signal to anybody from the engine, and to give a signal to get out of the way, if he saw any one working on the track that apparently we were getting too close to."

As to the engineman the jury undoubtedly could have found on the evidence, that it was the custom if he saw any one on the track to sound the whistle, or if the road ahead cannot be seen to "shut off steam and slow down," because "every railroad man relies on that custom for his own safety and the safety of the people he is taking care of." And that it was the duty of the engineman "to blow the whistle if he did see a man there, or he had reason to believe that a man was there who did not know that his train was coming." But there is no evidence that the road ever promulgated such a rule for the observance of enginemen, and, even if it had done so, the record fails to show that the engineman saw, or by the exercise of reasonable diligence could have seen, the intestate. Nor was it evidence of his negligence that the jury could have found that the train was late and running "very much faster" than the plaintiff's witness "ever saw it go before." It is not shown that the speed was excessive. See *Clapp v. New York, New Haven, & Hartford Railroad*, 229 Mass. 532.

The engineman furthermore had the right to rely on the pre-

sumption that the signal men, including the intestate, who are shown by the record to have been thoroughly familiar with the location of the tracks and the movements of both freight and passenger trains, would take reasonable precautions to ensure their own safety, and the jury in view of the atmospheric conditions would not have been warranted in finding that the engineman was negligent in failing to discover the presence of the intestate either at the signal, or on the track. *Cruzan v. New York Central & Hudson River Railroad*, 227 Mass. 594.

The engineman also testified, and his evidence was uncontradicted, that the engine bell operated by "an automatic ringer" continuously rang as he approached and passed the bridge and went by the signal and the station to the west of the bridge.

It would serve no useful purpose to enumerate and discuss in detail the numerous exceptions taken to the rulings relating to the exclusion of evidence offered by the plaintiff in so far as they have not been waived. We have examined all of them and find no reversible error. The plaintiff was given the benefit of every alleged relevant rule, and the rules or portion of rules excluded were wholly irrelevant when applied to the use of the track for freight trains where the accident happened, and the duties and conduct of firemen and enginemen under the conditions of operation previously described.

The judge also rightly excluded the portion of a time-table showing automatic, electric, semaphore and block signals located in connection with the station nearly a mile west of the switch where the freight train in question was not scheduled to stop.

The defendant in accordance with St. 1911, c. 751, Part III, § 18, and amendatory acts, made a report of the accident to the Industrial Accident Board. The plaintiff having been permitted subject to the defendant's objection and exception to introduce this report, the defendant was allowed to put in a second report, in which after the words, "Describe fully how injury occurred," the answer was, "Correct cause of accident is given as follows: Was undoubtedly running for a train and was struck by unknown train on other track." It is unnecessary to decide whether the first report was admissible, as the defendant is not the excepting party. But, as both reports were filed in compliance with the

requirements of the statute, they should be treated as forming one entire report, and the judge correctly ruled that this could be shown by the defendant.

The statement by the defendant in the report as the cause of the accident, "Was undoubtedly running for a train and was struck by unknown train on other track," is not an admission of its negligence.

*Exceptions overruled.*

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PLYMOUTH AND SANDWICH STREET RAILWAY COMPANY vs.  
INHABITANTS OF PLYMOUTH & others.

Suffolk. December 2, 3, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, & PIERCE, JJ.

*Municipal Corporations. Mandamus.*

A vote passed by a town, under authority given by a statute, that "the selectmen . . . be and are hereby authorized in the name and on behalf of the town to subscribe for or purchase five hundred (500) shares of the capital stock of [a certain street railway corporation] at a price not exceeding the par value thereof," and that "such subscription or purchase shall not be made by the selectmen until they are satisfied that the balance of the amount necessary for the construction and equipment of said road is fully provided for," is not of the class of votes giving authority to do an act which are to be construed as directing that the act shall be done, and where the selectmen of the town, acting under this vote in good faith, after consideration of the situation, were not satisfied that the railway corporation had fully provided for the "balance of the amount necessary" within the terms of the vote, and refused to make the subscription when requested to do so by the railway corporation, the railway corporation cannot maintain a petition for a writ of mandamus to compel the town to make the subscription.

PETITION, filed on October 10, 1917, by the Plymouth and Sandwich Street Railway Company for a writ of mandamus addressed to the town of Plymouth and its selectmen commanding them to subscribe for or purchase five hundred shares of the capital stock of the petitioner under the authority given by St. 1911, c. 95, in accordance with a vote of that town, which is quoted in the opinion.

The case was heard by *De Courcy, J.* Upon the facts which are stated in the opinion he made the following finding: "I find that



the selectmen, in good faith and after consideration of the situation, are not satisfied that the road has provided the 'balance of the amount necessary' within the terms of the vote. Until they are so satisfied, the subscription for the stock is discretionary with them. The court cannot control the exercise of that discretion, at least so long as the selectmen act in good faith. For this reason the petition must be dismissed, and it is so ordered."

At the request of the petitioner the single justice reported the case for determination by the full court.

*J. P. Fagan*, (*J. E. Cotter* with him,) for the petitioner.

*H. W. Brown*, for the respondents.

LORING, J. On March 2, 1911, the town of Plymouth was authorized (among other things) to subscribe for shares in the capital stock of the petitioner on a condition which was duly fulfilled later on. St. 1911, c. 95. On the twenty-fifth day of the same month the town voted "that the selectmen for the time being be and are hereby authorized in the name and on behalf of the town to subscribe for or purchase five hundred (500) shares of the capital stock of the Plymouth & Sandwich Street Railway Company at a price not exceeding the par value thereof. Such subscription or purchase shall not be made by the selectmen until they are satisfied that the balance of the amount necessary for the construction and equipment of said road is fully provided for." Later on (apparently on February 28, 1917) the railway company "made demand on the selectmen for the purchase of five hundred shares of its capital stock. On the refusal of the selectmen, this petition for mandamus was brought."

On January 1, 1917, the cost of the construction and equipment of the road amounted to \$387,000 (in round figures) "with some thousands of dollars yet to be expended for necessary construction." \$152,000 of the \$387,000 had been provided for by the issue of capital stock; \$217,000 by borrowing money on notes payable in one year after the money was borrowed (some of these notes were overdue) and for the balance of \$18,000 the company had run in debt. It is not clear on the report whether "some thousands of dollars yet to be expended for necessary construction" covers the cost of completing the road to Sandwich or whether the cost of completing the road to Sandwich is in addition to the "some thousands of dollars yet to be expended

for necessary construction." The road had been constructed to a point three quarters of a mile short of the boundary line between Bourne and Sandwich and the cost of completing it to the boundary line was estimated to be about \$2,500. The village of Sandwich lies one mile and a half farther on and the cost of completing the road to the village would have required an estimated expenditure of \$21,000 to \$25,000.

By the true construction of the vote of the town the selectmen were given permission to subscribe to five hundred shares in the capital stock of the railway company. There are instances in which votes giving authority to do an act are to be construed to be votes directing that act to be done. This is not one of those cases. Beyond this the authority or permission to subscribe was made conditional on the selectmen being "satisfied that the balance of the amount necessary for the construction and equipment of said road" has been "fully provided for;" that is to say on the selectmen being satisfied that the amount necessary for the construction and equipment of the road in addition to the \$50,000 which would come to the petitioner from the subscription of the town (if the selectmen subscribed for shares of stock under the vote of the town) had been "fully provided for." The single justice found that the "selectmen, in good faith and after consideration of the situation, are not satisfied that the road has provided the 'balance of the amount necessary' within the terms of the vote." This finding is decisive of this case.

From the terms of the report it would seem that the correctness of the finding made by the single justice is not now before us. But an extended argument on that point has been made. If the correctness of the finding made by the single justice is before us we are of opinion that it was correct. Indeed it is hard for us to see how any other conclusion could have been reached either by the selectmen or by the single justice. In saying this we have not overlooked the fact that the petitioner had no mortgage debt, that "it planned to refund the construction notes by an issue of stock or other form of permanent security when the road had been completed and was in a position so to do. And the bankers for the petitioner agreed with the petitioner to effect a renewal of such of said notes as were not exchanged at maturity for preferred stock." And that at the meeting held on February 28, 1917,

"between representatives of the petitioner and the selectmen, said representatives offered to accept the bonds of the town issued under the votes passed at the meeting of March 25, 1911, or to find purchasers for the same."

It is not necessary to consider the further objections urged against granting to it the relief sought by the petitioner through this petition.

*Petition dismissed.*

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MICHAEL J. SUGHRUE, administrator, vs. EDWARD S. BOOTH.

Suffolk. December 5, 1918. — January 2, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COUCEY, & PIERCE, JJ.

*Negligence, In unloading vessel, Toward one acting as custodian of vessel.*

A master stevedore who has been employed by the owner of a vessel to unload her is bound to exercise reasonable care not to injure one who has been appointed custodian of the vessel by the United States marshal of the district and is lawfully on board of the vessel in that capacity.

TORT by the administrator of the estate of Daniel J. A'Hern, late of Boston, for conscious suffering of the plaintiff's intestate from an injury received on October 21, 1916, and for his death on November 7, 1916. Writ dated December 16, 1916.

In the Superior Court the case was tried before Dana, J. There was evidence that the defendant was a master stevedore who was performing a contract to unload a cargo of sugar from the steamship Gulfaxe at the wharf of the American Sugar Refining Company in the part of Boston called South Boston, that the plaintiff had been appointed by the United States marshal for the district of Massachusetts custodian of the vessel for the marshal and was on board of the vessel in the performance of his duties as such custodian, when he was struck by four bags of sugar, that were being hoisted by the defendant's servants from the deck of the vessel to the wharf, and was jammed against the rail of the vessel, sustaining the injuries which resulted in his death sixteen days later.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, with a stipulation of the parties that, if this court "shall decide that the action of the

Superior Court in ordering the verdict was right, final judgment shall be entered for the defendant upon the verdict. If the decision . . . is that the [judge of the Superior Court] was wrong in directing a verdict . . . , judgment shall be entered for the plaintiff in the sum of \$2,500."

*James J. McCarthy*, (*M. Bergman* with him,) for the plaintiff.

*E. C. Stone*, for the defendant, submitted a brief.

LORING, J. It is in effect conceded by the defendant that the plaintiff's intestate was killed by the negligence of the defendant's servants in unloading the cargo of the steamship *Gulfaxe*. The defendant has undertaken to uphold the ruling of the presiding judge on the ground that to make out liability for conscious suffering the plaintiff had to prove reckless and wanton misconduct on the part of the defendant's servants and that he had to prove gross negligence to make out liability for death.

At the time in question the *Gulfaxe* was in the custody of the United States marshal who had appointed the intestate his custodian. The defendant was a stevedore engaged in unloading the cargo of the steamship.

The defendant's contention as to the measure of the defendant's liability for conscious suffering is based on the assumption that the deceased was a licensee. But, if the deceased was a licensee of the owner of the *Gulfaxe*, that fact is immaterial in this action against the stevedore. *Boutlier v. Malden*, 226 Mass. 479. Even if the defendant had been the owner of the *Gulfaxe* and the intestate nothing but a licensee, the duty owed by the defendant in unloading the cargo would have been to use ordinary care. *Corrigan v. Union Sugar Refinery*, 98 Mass. 577. The truth is, however, that the defendant owed the intestate the duty of exercising due care in unloading the cargo for the same reason that one traveller on a public way owes another traveller on the way the duty of exercising due care not to injure him. In that case and in the case at bar both persons are rightly where they were. For the reasons stated the decision in *Kjaer & Isdahl v. Etier*, 222 Fed. Rep. 243, has nothing to do with the case at bar.

Since St. 1907, c. 375, amending R. L. c. 171, § 2, it is only necessary to show ordinary negligence to hold a defendant liable for the death of a person in the position of the plaintiff. We are

of opinion that the jury could have found that the intestate was in the exercise of due care.

It was stipulated that, if the presiding judge "was wrong in directing a verdict . . . , judgment shall be entered for the plaintiff in the sum of \$2,500." That means that, if the plaintiff had a right to go to the jury on either count, judgment is to be entered for the plaintiff in the sum of \$2,500. We are of opinion that the judge was wrong in case of both counts. It follows that judgment must be entered for the plaintiff in the sum of \$2,500.

*So ordered.*

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CITY OF NORTHAMPTON vs. NORTHAMPTON STREET RAILWAY  
COMPANY.

Hampshire. September 17, 1918. — January 3, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Street Railway. Public Officer. Municipal Corporation, Officers and agents.  
Contract, What constitutes. Interest.*

The board of aldermen of a city, in granting to a street railway corporation under the authority given by St. 1874, c. 29, § 11, Pub. Sts. c. 113, § 21, an extension of the location of its tracks in that city and imposing a condition that the corporation "shall maintain and keep in repair such portions of the streets, roads and bridges, respectively, as are occupied by its tracks, and eighteen inches on each side thereof, to the satisfaction of the superintendent of streets," act as public officers and not as agents of the city, and the acceptance of the location by the street railway corporation does not constitute a contract of the corporation with the city that it will comply with the conditions of the grant.

Where a street railway corporation, in compliance with a condition imposed by the grant of an extension of location made to it by the aldermen of a city, has executed and given to the city a bond containing a covenant "that so long as it shall operate said granted extensions of its road it will protect and save harmless the city . . . from any and all loss, cost or damage of every kind, nature or description, which it may at any time suffer by reason [of] the construction and operation of said extensions of its road or of any part thereof," the city may maintain an action of contract against the street railway corporation to recover the defendant's agreed proportion of the expense of maintaining certain bridges upon the granted locations (except the cost of painting) which is in addition to the cost and expense of maintaining in repair the surface material of the bridges and which arises from and is due to the greater wear and strain thereon and the greater deterioration to which the bridges have been subjected by the use of the street railway corporation in addition to that to which they would have been subjected by ordinary travel.

In an action of contract with a declaration containing four counts, purporting to set forth three causes of action, a fifth count, to recover the interest due for the failure of the defendant to meet upon demand its several obligations alleged in the other counts, sets forth no independent cause of action and a demurrer to it on this ground will be sustained.

CONTRACT by the city of Northampton against the Northampton Street Railway Company, the amended declaration containing five counts, which are described in the opinion. Writ dated July 22, 1915.

The defendant demurred to the declaration. The first, second, eighth and ninth causes assigned for demurrer were as follows, the others having been made immaterial by the decision of this court:

"1. That the amended declaration does not state a legal cause of action substantially in accordance with the rules contained in R. L. c. 173.

"2. That the first, second and third counts of the plaintiff's amended declaration are founded on franchises and grants of location, and not on contracts made by the defendant."

"8. That the contract set forth in the fourth count of the plaintiff's amended declaration does not impose upon the defendant any obligation to pay to the plaintiff any portion of the sums expended in repairs on the bridges described in said count.

"9. That the fifth count of the plaintiff's amended declaration sets out no independent cause of action."

In the Superior Court the case was argued on the demurrer before *Aiken*, C. J., who made an order sustaining the demurrer, and, being of opinion that the questions raised by the demurrer ought to be determined by this court, reported the case for such determination.

*J. C. Hammond*, in the absence at the front in France of his son, Captain *T. J. Hammond*, for the plaintiff.

*E. L. Shaw*, for the defendant.

PIERCE, J. By St. 1865, c. 128, the Northampton Street Railway was incorporated under the name of the Northampton and Williamsburg Street Railway Company, and thereby was made subject to the duties, restrictions and liability then imposed by law. One of the obligations so imposed was that it and its lessees or assignees "shall maintain and keep in repair such portions of

the streets, roads and bridges, respectively, as are occupied by its tracks, and eighteen inches on each side thereof, to the satisfaction of the superintendent of streets, . . ." St. 1864, c. 229, § 18.

The selectmen of Northampton accepted the act incorporating the street railway company January 31, 1866, (St. 1864, c. 229, § 12,) and on the same day granted to the street railway company a location which contained no restrictive conditions or agreements other than the requirement that "The position of all said tracks on said several highways to be fixed under the supervision of said selectmen and subject to their direction. And said selectmen further order that the motive power to be used by said company on said tracks, may be horse power and not steam." The street railway company accepted the location and under it built its road, through Elm and Main streets to Florence, which it operated as a horse railway until 1894 when electricity was adopted as a motive power.

In April, 1893, the company was granted authority to construct, maintain and operate the overhead trolley system of electric power in the operation of its cars. It was also granted "extensions of the locations to the Village called Bay State, to the Village called Leeds; and through South Street; and through Bridge Street," subject to conditions and restrictions. Among them was the condition that "Where the said Company's tracks are laid on any bridge in said City, they shall be laid as directed by the Board of Aldermen, and the said Company shall pay one-fourth of expense of maintaining said bridge, except cost of painting." There was also a condition that, "The said Company shall, before any work of construction is commenced, execute, under seal, a contract in the following words, . . . :

"This agreement made this . . . day of . . . , 1893, by and between the Northampton Street Railway Company, a corporation established by law in Northampton, Mass., and the City of Northampton, a municipal corporation in said Massachusetts, Witnesseth:—

"Whereas, the Board of Mayor and Aldermen of said City on the . . . day of . . . , 1893, passed an order permitting said Company to construct, maintain and use the over-head trolley electric system of motive power, so called, in the operation of its cars on its tracks as in said order described and on conditions

therein set forth, to which order reference is to be had, the same being a part hereof to the same extent as if written herein in full.

"Now therefore, for a valuable consideration by it received of the said City, the said Northampton Street Railway Company, hereby covenants and agrees with said city that, so long as it shall operate its cars on said tracks by said system, it will protect and save harmless the city, from all loss, costs, or damages of every kind, nature or description, which it at any time suffers, by reason of the erection, maintenance, and operation of said system or any part thereof. . . ."

In January, 1894, the street railway company was granted a further extension of its location "towards Easthampton and towards Williamsburg; . . . subject to all existing conditions and regulations and subject to the by-laws of this city and the Statutes of the State thereto applicable;" and specifically to the condition that "If in the process of construction of the Williamsburg extension it becomes necessary to strengthen any highway bridge in order to sustain with safety the weight of a street car and its load, it shall be done without expense to the city, and to the satisfaction of the city engineer;" and to the further condition that "The Company shall give to the city a bond, applicable to the present extension, of the same general tenor and form, as the bond given under the acceptance of the franchise granted to it in 1893." The bond last given so far as material was in the following words:

"Now therefore for a valuable consideration received from said City, the said Northampton Street Railway Company hereby covenants and agrees with said City, that so long as it shall operate said granted extensions of its road it will protect and save harmless the City of Northampton from any and all loss, cost or damage of every kind, nature or description, which it may at any time suffer by reason [of] the construction and operation of said extensions of its road or of any part thereof."

The plaintiff, in an action of contract, seeks in count 1 of the declaration to recover of the defendant a sum of money which it alleges it expended in 1914 in keeping in repair that portion of Main Street which was within the tracks as located and eighteen inches outside thereof. In count 2 it seeks to recover, upon the condition quoted above, one fourth of the sum alleged to have been necessarily expended in repairing the structure and floor of



the South Street bridge in 1912. In count 3 it seeks to recover one fourth of the sum alleged to have been necessarily expended in the repair of the structure of three bridges in the village of Leeds. In count 4 the plaintiff declares upon the bond or covenant last above quoted, given to the plaintiff in performance of the condition or restriction upon the enjoyment of the grant of the extension of the location "towards Easthampton and towards Williamsburg" in 1894, alleging that "The bridges situate on said Williamsburg extension and hereinbefore referred to were by reason of the operation of the defendant street railway subject to the greater servitude and to greater wear and deterioration" than they otherwise would have sustained, and seeks to recover one fourth of the sum alleged to have been expended by the plaintiff as set forth in count 3. Count 3 and count 4 are stated to be for the same cause of action. Count 5 seeks to recover interest by way of damages after an alleged demand of payment of the respective items set forth in all the other counts of the declaration. The defendant demurred to the declaration and specifically assigned ten causes of demurrer. The demurrer was sustained generally, and the question raised thereby reported to this court.

Among the causes is, "2d. That the first, second and third counts of the plaintiff's amended declaration are founded on franchises and grants of location, and not on contracts made by the defendant." On this ground, without considering the force of any other of the assigned causes of demurrer, we are of opinion the demurrer to counts 1, 2 and 3 was sustained rightly. The burden of maintaining and keeping in repair the portion of the streets, roads and bridges occupied by the track, and for eighteen inches on each side thereof, was cast upon the defendant by the general law, St. 1864, c. 229, § 18. The extensions of location granted by the board of aldermen of the city of Northampton in 1893 and 1894, presumably were granted upon the authority conferred upon the board of aldermen by St. 1874, c. 29, § 11, Pub. Sts. c. 113, § 21, to authorize the extension of the location of tracks "under such restrictions as they deem the interests of the public may require." The boards of aldermen and boards of selectmen in imposing restrictions and in requiring agreements as conditions of the grant of the location and of the extensions of the location, acted as public officers, and not as

agents or trustees of the city and town respectively. *Flood v. Leahy*, 183 Mass. 232. *Cheney v. Barker*, 198 Mass. 356, 364. *Board of Survey of Arlington v. Bay State Street Railway*, 224 Mass. 463, 469. However beneficial to the plaintiff, the acceptance of the grants subject to the conditions therein contained did not constitute a contract as between the plaintiff and the defendant. It is enough to say that there is no privity of contract between the plaintiff and the defendant. *Selectmen of Clinton v. Worcester Consolidated Street Railway*, 199 Mass. 279, 286. See *Boston, petitioner*, 221 Mass. 468, 478; *Springfield v. Springfield Street Railway*, 182 Mass. 41, 47; *Attorney General v. Metropolitan Railroad*, 125 Mass. 515; *Worcester v. Worcester Consolidated Street Railway*, 182 Mass. 49. The remedy of the plaintiff, if any, is in equity. Pub. Sts. c. 113, § 63. St. 1898, c. 578, § 25. St. 1906, c. 463, Part III, § 157.

We think the demurrer to the fourth count should have been overruled. This is an action upon a covenant contained in an instrument under seal, by the obligee or covenantee against the obligor; consequently, it is not and cannot be claimed that the plaintiff and the defendant are not proper parties to the action. The covenant "that so long as it shall operate said granted extensions of its road it will protect and save harmless the city of Northampton from any and all loss, cost or damage of every kind, nature or description, which it may at any time suffer by reason [of] the construction and operation of said extensions of its road or of any part thereof," is broad and comprehensive, and in terms is sufficient to justify the claim of the plaintiff that, excluding the obligation imposed by law before St. 1898, c. 578, § 11, it includes an obligation to save the city of Northampton harmless from one fourth the expense of maintaining the bridges upon the locations extended in 1894 except the cost of painting which shall be in addition to the cost and expense of maintaining in repair the surface material of the bridges, and which arises from and is due to the greater wear and strain thereon and the greater deterioration to which they were subjected by the use of the street railway, and to which the bridges would not otherwise have been subjected by ordinary travel. Such condition, restriction and agreement, in so far as it was in addition to the burden imposed on the defendant by St. 1864, c. 229, § 18, or otherwise, to keep the streets, roads

and bridges in repair, was not abrogated by St. 1898, c. 578, § 11, which enacts that "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair" unless the legal obligation was imposed in original grants of location. *Selectmen of Hyde Park v. Old Colony Street Railway*, 188 Mass. 180. The case of *Fall River v. Bay State Street Railway*, 228 Mass. 575, is not in conflict, as it decided only that an alleged obligation of the street railway to keep in repair "all of the roadway of said bridge, for its entire length," was annulled by St. 1898, c. 578, § 11. See *Worcester v. Worcester Consolidated Street Railway*, *supra*, in connection with *Mayor & Aldermen of Worcester v. Worcester Consolidated Street Railway*, 192 Mass. 106.

Count 5 presents no independent cause of action; the different items of interest arise, if at all, by way of damage for the failure of the defendant to meet its several obligations upon demand, and distributively should form one of the items sought to be recovered under each of the several counts. The demurrer thereto must be sustained. R. L. c. 173, § 6, cls. 4, 5.

It follows that the demurrers must be sustained as to counts 1, 2, 3 and 5 of the declaration, and overruled as to count 4. And it is

*So ordered.*

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STEPHEN H. CLARK, administrator, vs. NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Bristol. October 28, 1918. — January 3, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Law of the Case.* Practice, Civil, New trial. Corporation, Fund for injured employees, Officers and agents. *Evidence.* Of bad faith.

Where a case comes before this court for a second time the decision of this court at the previous stage of the case is the law of the case and is not open to question upon any of the points of law then passed upon.

Where in an action at law a verdict was returned for the plaintiff and exceptions, alleged by the defendant, were sustained by a decision of this court, in order to entitle the plaintiff to go to the jury at a new trial of the case upon the same issues he must produce evidence which, if it had been presented at the former

trial in addition to the evidence then produced, would have required this court to make a different decision.

In an action against a corporation, by the administrator of the estate of a deceased injured employee who also was his alleged dependent, upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it appeared, at a first trial, that the committee empowered to administer the fund was composed of the five heads of departments of the defendant and that all of them were the defendant's employees and were fellow employees of the plaintiff's intestate, and that this committee decided against the plaintiff's claim, because they found in good faith that he was not dependent upon the earnings of the deceased, and it was held on these facts by this court that the plaintiff was not entitled to recover. At a new trial, it appeared that of the committee of five one had been a director and another the secretary of the defendant but that neither of them held a corporate office at the time their decision was made, that when their decision was made three of them held stock in a corporation which owned a controlling interest in the stock of the defendant and that one of these also held shares of stock in the defendant itself, and that the names of the five persons, heads of departments of the defendant, who constituted the committee, were placed in the defendant's telephone directory under the heading "Officers." Held that these additional facts which appeared at the new trial did not show that the members of the committee were not employees of the company and fellow employees of the plaintiff's intestate and did not show that the committee was constituted unlawfully, that its members were parties in interest or that they acted in bad faith, and consequently that the plaintiff was not entitled to go to the jury at the new trial.

CONTRACT, by amendment from an action of tort, by the administrator of the estate of Harry W. Clark, late of the town of Fairhaven, the plaintiff being alleged to have been in his individual capacity dependent upon the earnings of his intestate for support, upon a contract of the defendant to indemnify its employees and the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, the plaintiff's intestate having died as the result of an injury received on May 7, 1913, when he was in the employ of the defendant. Writ dated May 6, 1914.

In the Superior Court the case first was tried before *Sanderson, J.* The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which were sustained by a decision of this court reported in 229 Mass. 1.

There was a new trial before *Hammond, J.*, at which the additional evidence was presented that is described in the opinion.

At the close of the plaintiff's evidence the judge, upon a motion of the defendant, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*C. R. Cummings*, (*J. W. Nugent* with him,) for the plaintiff.

*J. N. Clark*, for the defendant.

PIERCE, J. At the former hearing before this court, *Clark v. New England Telephone & Telegraph Co.* 229 Mass. 1, upon the evidence then presented, it was adjudicated that "The obligation to make payments out of the fund was confined to such as were ordered by the committee;" that "The committee is made the *quasi* arbitrator as to all claims against the fund;" that "So far as that plan is executed in good faith, no sound reason appears why its terms should not govern the rights of the parties;" that "The fund was established exclusively for the benefit of its employees;" that "To place its administration concerning payments to be made from it wholly in their hands cannot be said as matter of law to have been improper or contrary to public policy;" that there could be no recovery "if the committee made no order for payment to the plaintiff because they found in good faith that he was not dependent upon the earnings of the deceased;" and that it was not "evidence of bad faith or dishonesty" that the committee relied on the report of its investigator and made its decision without notice to, or a hearing of, the parties.

The conclusiveness of that decision is not open to attack. It is the law of the case. The plaintiff to get to a jury upon a new trial involving these issues must produce for their consideration evidence which, had it been produced at the former trial in addition to that offered, would have necessitated a different conclusion by this court. *Taylor v. Pierce Brothers, Ltd.* 220 Mass. 254. *Arnold v. Maxwell*, 230 Mass. 441, 445.

At the former trial it appeared that the committee referred to was composed of five heads of departments of the defendant, all its employees and fellow employees with the deceased. At the new trial in addition it appeared that the committee was appointed in November, 1912, and that its membership remained the same during the year 1913; that of the five members one was a director and one was the secretary of the defendant when appointed, but that both had ceased to hold their corporate offices before the accident and neither of them held corporate office when the

decision of the committee was made; that of the five members in 1913, when the decision was rendered, three held respectively ten, fourteen and six shares of stock in the American Telephone and Telegraph Company, which corporation then owned fifty-three per cent of the shares of stock of the defendant corporation; and that one of those members held eight shares of stock in the defendant company. It also was shown that after May 5, 1913, the defendant advertised in the telephone directory under the heading "Directors" the names of its directors, and under the heading "Officers" the names and titles of persons holding the usual and customary corporate offices, namely, the president, vice president, general manager, treasurer, assistant treasurer, general auditor and secretary; then followed the names and titles of the five persons, heads of departments, who by the evidence are shown to have constituted the committee.

We do not think the heads of departments are not employees of the company, and fellow employees of the deceased, because of ownership of stock in the employer company or because they are advertised as "Officers" in a book of general reference issued by the company. It is established law in this Commonwealth that the corporate entity is distinct from that of its shareholders, and that at common law all persons in the service of a corporation are fellow employees, whatever be the grade of their employment.

Nor do we think that, under the plan governing the creation, maintenance and distribution of the fund to beneficiaries who "may elect to accept such benefits or to prosecute such claims as he or they may have at law against the company," the board of directors could not legally appoint to serve upon that committee an employee who held shares of stock in the defendant company. *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 8. *Marsch v. Southern New England Railroad*, 230 Mass. 483.

It follows that the plaintiff has failed upon all the evidence produced at both trials to prove that the committee was illegally constituted, that it was a party in interest, or that it acted in bad faith.

*Exceptions overruled.*

JOSEPHINE C. FLYNN (afterwards JOSEPH J. FLYNN, administrator,) *vs.* HENRY B. LEWIS.

JOSEPH J. FLYNN, administrator, *vs.* SAME.

Essex. November 14, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence, Invited person, Causing death. Motor Vehicle. Evidence, Of negligence at other times, Competency. Practice, Civil, Exceptions.*

In an action by a young girl against the owner of a motor car for personal injuries caused by the negligence of the defendant's chauffeur, which resulted in the overturning of the car when the plaintiff was being transported in it by invitation of the defendant's daughter authorized by the defendant, where it appears that the plaintiff was a friend of the defendant's daughter, that, with the defendant's permission, she was asked by the daughter to go with her to help her to select a fur coat and that the accident happened when they were returning, the plaintiff has only the right of an invited guest who was travelling gratuitously, and the defendant is not liable at common law for her injuries unless they were caused by the gross negligence of his servant, the chauffeur.

In the case above described it also was *held* that whether the chauffeur was grossly negligent was a question of fact for the jury on the evidence presented and that the presiding judge rightly refused to rule as matter of law that upon all the evidence the plaintiff had established gross negligence on the part of the chauffeur.

In the case above described the presiding judge excluded evidence offered by the plaintiff to show, that on the morning of the day of the accident, when the defendant's wife was using the motor car, the chauffeur drove fast, the plaintiff contending that this tended to show reckless habits of the chauffeur which were known or ought to have been known to the defendant, and it was *held* that the evidence was excluded properly.

In the same case a witness, who accompanied by his housekeeper was passing over the road in a touring car and saw the accident, was asked by the plaintiff, whether "he saw his housekeeper do anything when she saw" the defendant's car. The judge excluded the question, subject to the plaintiff's exception, but there was nothing in the bill of exceptions to show what answer was expected from the witness. It was *held* that, for this reason alone, no exception to the exclusion of the unknown answer could be sustained, and it also was *said*, that, even if the answer would have been that the housekeeper exhibited signs of fright, which the jury could have inferred were caused by what she had seen, this evidence would have been incompetent to show negligence on the part of the chauffeur.

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate when she was travelling as an invited guest in the defendant's motor car, which was overturned by reason

of the negligent driving of the defendant's chauffeur, it is right for the presiding judge to refuse to rule that the plaintiff cannot recover unless gross negligence of the chauffeur is shown, because the statute by its terms provides for recovery on proof of only ordinary negligence.

TWO ACTIONS OF TORT against the owner of a motor car, the first begun by Josephine C. Flynn and, after her death, allowed to be prosecuted by Joseph J. Flynn, the administrator of her estate, for personal injuries sustained on November 8, 1916, when the original plaintiff was being transported as an invited guest and as assistant to the defendant's daughter in a motor car of the defendant driven negligently and also recklessly and with gross negligence by one Danforth, who was the servant of the defendant. The second action was brought by the administrator of the estate of Josephine C. Flynn under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing her death by the same injuries. Writs dated respectively June 18 and October 31, 1917.

In the Superior Court the cases were tried together before *Morton, J.* The evidence is described in the opinion. At the close of the evidence the plaintiff asked the judge to make in the first action the following rulings:

"1. If the jury find that the plaintiff's intestate was in the machine for the purpose of assisting the defendant's daughter at the request of the defendant, through his daughter, the defendant owed her a higher degree of care to transport her safely than if she was a mere guest, and is liable for his negligence or that of his servant or agent.

"2. Upon all the evidence the plaintiff's intestate was not a mere guest but at least one of her purposes in the machine was of assisting the defendant's daughter at the request of the defendant, through his daughter, in the selection of a garment and it is not necessary for the plaintiff to prove gross negligence on the part of the defendant or his agent or servant in order to recover.

"3. Upon all the evidence the plaintiff has established gross negligence on the part of the chauffeur."

The judge refused to make any of these rulings, and ruled that the plaintiff's intestate was a mere guest and that in order to recover the plaintiff must prove gross negligence on the part of the defendant or his chauffeur.

In the second action, under the statute, for causing the death



of the plaintiff's intestate, the defendant asked the judge to rule, "that upon all the evidence the plaintiff could not recover in this action for ordinary negligence of the defendant or of his chauffeur, for the reason that the plaintiff's intestate was a guest in the defendant's car and that the defendant could not be liable except for the gross negligence upon either his part or upon the part of said chauffeur." The judge refused to make this ruling.

The judge then submitted to the jury certain special questions, which, with the answers of the jury, were as follows:

In the common law action:

"1. Was the defendant Lewis grossly negligent in retaining Danforth in his employ as a chauffeur?" The jury answered, "No."

"2. Was Danforth, the chauffeur, grossly negligent at the time of the accident?" The jury answered, "No."

"3. Was Miss Flynn in the exercise of due care?" The jury returned no answer.

"4. If answer to either the first or second question is Yes — and the answer to the third question is Yes — then the damages?" The jury returned no answer.

In the action under the statute for causing death:

"1. Was Lewis negligent in retaining Danforth as chauffeur?" The jury answered, "No."

"2. Was Danforth negligent at the time of the accident?" The jury answered, "Yes."

"3. Was Miss Flynn in the exercise of due care?" The jury answered, "Yes."

"4. If answer to either first or second question is Yes — and answer to third question is Yes — amount of penalty?" The jury answered "\$5,500."

Thereupon by order of the judge the jury returned a verdict for the defendant in the first action, at common law, and in the second action, under the statute, returned a verdict for the plaintiff in the sum of \$5,500.

In the first action the plaintiff alleged exceptions, including the exceptions to the exclusion of certain evidence which are described in the opinion.

In the second action the defendant alleged exceptions.

R. L. c. 171, § 2, as amended by St. 1907, c. 375, begins as

follows: "If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, . . ."

*W. Coulson*, for the plaintiff.

*W. I. Badger*, for the defendant.

BRALEY, J. The plaintiff's intestate while travelling in the defendant's automobile driven by a chauffeur employed by him, having suffered personal injuries, which after a period of conscious suffering resulted in death, the first action is at common law for her injuries, and the second action is brought under R. L. c. 171, § 2, as amended by St. 1907, c. 375, to recover damages for her death. The jury having found on evidence which warranted the finding, that the overturning of the automobile was due to the negligence of the chauffeur and that the decedent was in the exercise of due care, we come to the question of the defendant's liability.

It was uncontroverted that the decedent was in the automobile on the invitation of the defendant's daughter to whom her father had given permission to use it for the purpose of going from Lawrence to Boston to buy a fur coat, and it was on the return journey that the accident happened. The defendant's responsibility rests on the authority conferred on his daughter to invite the decedent to accompany her. *Kennedy v. R. & L. Co.* 224 Mass. 207-209. The jury of course had the right to believe the evidence of the administrator who testified that, in an interview after the accident, the defendant said that his daughter told him "they were going to a football game on Saturday and asked me if she could have a fur coat. I told her of course she could. Then she asked me if she could have the machine, and if she could invite Josephine," the decedent, "to go to Boston with her to help her to select her coat. I told her she could." The question is the same as if the defendant personally had invited the decedent to accompany his daughter to help in the selection of the garment. It was agreed at the argument that they were intimate friends,

and often had driven together in the automobile, and it is plain that the decedent neither asked nor expected any recompense, but went for the accommodation of her friend by whom transportation for their mutual companionship and enjoyment had been provided. The element of any pecuniary benefit or gain to the defendant being absent, the transaction was gratuitous, under which the defendant is liable only for gross negligence in the operation of the automobile. *Massaletti v. Fitzroy*, 228 Mass. 487. *West v. Poor*, 196 Mass. 183. The case of *Loftus v. Pelletier*, 223 Mass. 63, where the evidence warranted a finding that the plaintiff's right to transportation by the defendant, a physician, was an implied term of her contract of employment as a nurse, is plainly distinguishable.

The plaintiff's first and second requests, "If the jury find that the plaintiff's intestate was in the machine for the purpose of assisting the defendant's daughter at the request of the defendant, through his daughter, the defendant owed her a higher degree of care to transport her safely than if she was a mere guest, and is liable for his negligence or that of his servant or agent," and that "Upon all the evidence the plaintiff's intestate was not a mere guest, but at least one of her purposes in the machine was of assisting the defendant's daughter at the request of the defendant, through his daughter, in the selection of a garment, and it is not necessary for the plaintiff to prove gross negligence on the part of the defendant or his agent or servant in order to recover," were properly denied.

The plaintiff's third request, to rule that upon all the evidence the plaintiff has established gross negligence on the part of the chauffeur, could not have been given. It was a question of fact for the jury, who have answered in the negative.

The plaintiff in this connection offered to show, that on the forenoon of the day of the accident the chauffeur, when the defendant's wife was using the car, drove fast, on the ground that any reckless habits of the employee which are known or ought to have been known to the employer are admissible. The evidence was inadmissible. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 14.

The question whether "he saw his housekeeper do anything when she saw the Packard" meaning the defendant's car, which

was asked by the plaintiff of a witness called by him and who accompanied by his housekeeper was passing over the road in a touring car and observed the accident, also was excluded rightly. The short answer is, that no offer, nor any statement, as to what the answer to the question would be was made. *Lee v. Tarplin*, 183 Mass. 52, 54. *Bachant v. Boston & Maine Railroad*, 187 Mass. 392, 396. But even if the answer had been that the housekeeper exhibited signs of fright which the jury could have inferred were caused by what she had seen, the evidence would not have been competent as tending to prove negligence of the chauffeur.

The final ruling to which the plaintiff also took exceptions, that unless gross negligence was proved the plaintiff could not recover, was correct.

Finding no error of law in the trial of the first case, we pass to the defendant's exceptions in the second case. The defendant requested the judge to rule that the plaintiff could not recover unless gross negligence was proved. But the statute in express terms requires proof only of ordinary negligence, and the ruling could not have been given. *Brown v. Thayer*, 212 Mass. 392, 397, 398.

The exceptions in each case must be overruled, and it is  
*So ordered.*



SKINNER IRRIGATION COMPANY vs. CHARLES S. BURKE.

Suffolk. November 14, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Contract, Validity. Lord's Day.*

At the trial of an action upon a contract for the installation of an irrigation system in which the defendant alleged in defence that the contract was void because made on the Lord's day, it appeared that on a Sunday an agent of the plaintiff and the defendant met and made an oral agreement for the installation of the system; that on the next day the plaintiff's agent wrote to the defendant a letter beginning, "We wish to confirm agreement which we reached yesterday," and continuing with minute specifications for the work and the price. The defendant received the letter but did not reply to it. The plaintiff in good faith went forward with the installation of the plant, doing all the work on secular days, the defendant knowing that the work was going forward and at times being present.

After the work was completed, the defendant contended that the "guarantee" was not fulfilled, and an agent visited the premises on a Sunday for an inspection and test. *Held*, that a finding was warranted that the installation was done under a contract made on Monday.

It also was *held* that the inspection and test performed by the plaintiff on a Sunday after the work was completed did not affect the plaintiff's right to recover.

It also was *held* proper to refuse to grant a request for a ruling that "The offer contained in the letter of the plaintiff to the defendant of . . . [Monday] . . . not having been accepted by the defendant only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover."

CONTRACT, with a declaration in two counts, the first count being upon a contract for the installation by the plaintiff for \$218 of a system of irrigation upon the premises of the defendant. The second count was upon an account annexed for the same installation. Writ in the Municipal Court of the City of Boston dated November 13, 1915.

The pleadings and the facts found by the judge of the Municipal Court are described in the opinion. The judge also found "that on Monday, June 28, 1915, the plaintiff's representative wrote the defendant a letter setting forth in detail the terms upon which the plaintiff offered to install its irrigation plant on the defendant's farm, and that thereafter the plaintiff proceeded to install said plant on said farm with the knowledge of the defendant, all the work of installation being done on secular days." The judge found for the plaintiff and at the request of the defendant reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

*S. M. Child*, for the defendant.

*G. Hoague*, for the plaintiff.

PIERCE, J. This is an action of contract to recover \$218 for the installation of a system of irrigation on the land of the defendant. The answer sets up in defence "that if any contract was made by the plaintiff and the defendant, it was made on the Lord's day, and cannot be enforced."

The facts, so far as they are material to the determination of the single question raised by the answer and argued in the brief of the defendant, are in substance as follows: On Sunday, June 27, 1915, the duly authorized agent of the plaintiff met the defendant and they made an oral agreement for the installation of the irrigation system at a fixed price. This contract was void in its inception and could not be ratified because its validity did

not depend in any degree on the choice of the defendant. "The law annulled it, and there was no subject of ratification." *Day v. McAllister*, 15 Gray, 433, 434.

On Monday, June 28, 1915, the agent wrote the defendant a letter which began: "We wish to confirm agreement which we reached yesterday regarding the installation . . . of irrigation at your place. . . ." In the paragraphs which followed the work which the plaintiff agreed to perform and accomplish was set out in minute detail, as was the "price for this work, installed complete as outlined." The defendant received the letter but did not reply to it. There was evidence that thereafter, in good faith, the plaintiff installed on the defendant's premises a system of irrigation, substantially in accordance with his letter of June 28, 1915; and that the defendant, as he testified, was present at times during the installation of the system and knew that it was being done. There was also evidence that the fair value of the system as installed was the contract price, \$218. Later, on August 9, 1915, the defendant wrote the agent that he had examined the plant and had found a leak which he had not the necessary tools to tighten, and concluded the letter by saying, "I guess you will have to send your man down to see just what the trouble is." On September 13, 1915, the defendant wrote the plaintiff company that "when all the pipes are working I can't cover the ground as your guarantee said it would." In response to this last letter the plaintiff proposed to visit and inspect the plant on Sunday, September 19, 1915; and did in fact inspect it on Sunday, September 26, 1915.

On the foregoing facts, we think the contract under which the irrigation system was installed was not the oral contract of Sunday, June 27, 1915, but was a new contract adopted on Monday, June 28, 1915, upon the terms and conditions stated in the letter of the plaintiff to the defendant on the last named date. See *Miles v. Janvrin*, 200 Mass. 514, 517, and cases cited. The fact that, after the work was completed and the right to receive the agreed price had accrued, the plaintiff, on a Sunday, examined and tested the plant on the defendant's complaint of an insufficiency which the judge of the Municipal Court found was not due to any defect in the system itself or its method of installation or any other fault of the plaintiff, does not by relation affect the

validity of the contract or the plaintiff's right to recover the agreed price, and distinguishes the case at bar from the cases of *Stewart v. Thayer*, 168 Mass. 519, and *Stewart v. Thayer*, 170 Mass. 560.

The judge refused rightly to rule as requested that "On all the evidence the plaintiff cannot recover," and that "The offer contained in the letter of the plaintiff to the defendant of June 28, 1915, not having been accepted by the defendant only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover."

*Order dismissing report affirmed.*

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WILLARD B. JACKSON vs. WILLIAM F. INNES.

Suffolk. November 15, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Conversion. Damages, In tort. Evidence, Of value, Opinion, Expert.*

Where, at the trial of an action for the conversion of a boat, the only evidence was that during the night of June 16 "said boat was taken away by some person," and from June 20 to August 31 "was in the possession of the defendant," when at the plaintiff's request the defendant delivered it to him, and that the defendant had made changes which required a substantial outlay by the plaintiff to restore the boat to its former condition and which, even when it was so restored, had greatly depreciated its value, no justification of the intermeddling by the defendant was shown and a finding that the defendant converted the boat to his own use was warranted.

In the action above described it also appeared that the boat was designed and built as a pleasure boat for use by the plaintiff during the spring and fall and for letting during the summer, that the plaintiff had done nothing toward letting the boat during the summer because it was out of his possession, and that the defendant had derived no income from it; and it was held that, the plaintiff being entitled to full compensation for all damage suffered by him through the conversion, might recover for the loss of the use of the boat during the period of detention as well as the expense to which he was put in restoring it to the condition in which it was when taken by the defendant.

At the trial of the action above described, it was error to permit a witness, other than the plaintiff, to testify as to the fair market value of the use of the boat during the period of detention without its being shown that such witness had any general experience or qualification which would make his opinion admissible.

TORT for the conversion of a boat. Writ in the Municipal Court of the City of Boston dated February 8, 1915.

The pleadings, the evidence and the rulings of the trial judge objected to by the defendant are described in the opinion. The judge found for the plaintiff and at the request of the defendant reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

The case was submitted on briefs.

*W. E. Sisk & R. L. Sisk*, for the defendant.

*R. B. Stone & E. N. Jones*, for the plaintiff.

BRALEY, J. The declaration alleges in substance that the defendant on or about the seventeenth day of June, 1914, with force and arms took and carried away the boat in question, and converted it to his own use, and for a long time deprived the plaintiff of the use, and destroyed portions of the upper works, and made various alterations, and broke, defaced and otherwise injured it, whereby the boat was rendered less valuable for the purposes of the plaintiff, and putting him to "great labor and expense to restore the boat to the condition in which it was when taken by the defendant."

The only evidence in support of the material allegations of asportation and conversion was given by the plaintiff, who testified, that "between the night of June 16, 1914, and the morning of June 17, 1914, said boat was taken away by some person, and from June 20, 1914, was in the possession of the defendant," when at his request the defendant delivered it to him on August 31, 1914. The record is silent as to the circumstances under which the defendant came into possession. But on the plaintiff's uncontradicted evidence it further appeared that the defendant had made changes which required a substantial outlay by the plaintiff before the boat could be restored to its former condition. The defendant offered no evidence, and even if it would be no defence that he had acted in good faith and in ignorance as to who was the owner, or what the owner's rights were, the circumstances under which it came into his possession do not appear. It being plain that as he could derive no title, right or authority from the plaintiff whose ownership is unquestioned, and who never voluntarily had parted with the boat, the defendant fails to show any justification for his intermeddling, and the trial judge rightly refused to rule that the plaintiff could not recover. *Stanley v. Gaylord*, 1 Cush. 536. *Varney v. Curtis*, 213 Mass. 309, 313, and cases



cited. The finding that he had converted it to his own use was warranted. *Scollard v. Brooks*, 170 Mass. 445, 448.

The second request, that the plaintiff can recover only nominal damages, and the fifth request, that "there is no evidence as to when the defendant obtained possession of the boat, except that for two weeks after receiving it he used the same, and therefore, he is not liable for any loss of rental to the plaintiff" could not have been given. The defendant not only had exercised dominion over, but had made material changes in the boat, which, even when restored to its original condition, had caused it to be greatly depreciated in value. It also was undisputed and the judge properly could find, that the boat was designed and built "as a pleasure boat for use" by the plaintiff "during the spring and fall and for letting during the summer; and that he had done nothing toward letting the boat in question during the summer because it was out of his possession." It is settled that ordinarily the measure of damages in an action for conversion is the fair and reasonable market value of the property with interest, or what the property was actually worth if there is no market value, or the special value to the owner if the article had an inappreciable commercial value. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500. *Beecher v. Denniston*, 13 Gray, 354, 355. *Stickney v. Allen*, 10 Gray, 352. If after the conversion the property is returned and accepted as in the present case, acceptance mitigates and limits the damages to the difference between the value of the property when converted and the time when it is returned. *Lucas v. Trumbull*, 15 Gray, 306. The amount of the assessment, whether nominal or substantial depends on the evidence. The plaintiff who is entitled to full compensation for all the injury suffered also can have damages for the loss of the use of the boat during the period of detention. It is of no consequence that no income was derived from it. The defendant who is a wrongdoer cannot avoid liability on that ground. *Johnson v. Holyoke*, 105 Mass. 80. *Berry v. Ingalls*, 199 Mass. 77. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, 236, 237. *Electric Lighting Co. of Mobile v. Rust*, 131 Ala. 484. *Lazarus v. Ely*, 45 Conn. 504. *Williamson v. Barrett*, 13 How. 101. *The Conqueror*, 166 U. S. 110, 128. *The Cayuga*, 14 Wall. 270. And evidence of the fair market rental value for the use of the boat was admissible on the question of

damages. *Cook v. Packard Motor Car Co.* 88 Conn. 590. *Lyman v. James*, 87 Vt. 486.

While the plaintiff as owner was properly permitted to give evidence as to "What was the fair market value of the use of said boat," the witness Graves, who "testified that boats of this kind could be let by the week or season, and that the price therefor by the season was from \$125 to \$130," and that the fair market value of the use of the boat from June 20 to September 30, 1914, was from \$125 to \$130, is not shown to have had any general experience, or to have possessed any qualifications which would make his opinion admissible. *Blaney v. Salem*, 160 Mass. 303. *Lincoln v. Commonwealth*, 164 Mass. 368, 380. *Farnum v. Pitcher*, 151 Mass. 470, 475. The evidence of Graves, which cannot be regarded and treated as not being prejudicial to the defendant, should have been excluded, and the defendant having seasonably objected to its admission the order of the Appellate Division dismissing the report must be reversed.

*So ordered.*

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WHEELER CONDENSER AND ENGINEERING COMPANY vs.  
THOMAS E. LIBBY.

Suffolk. November 18, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Deceit. Contract, Construction.*

A contract in writing for the purchase of machinery provided that the seller should furnish and deliver the machinery to the purchaser "within four weeks after approval of drawings" at a price named, and that payments were "to be made in four months' notes bearing interest at 6%—notes to be secured by Purchasers' bonds held by and guaranteed by" a certain corporation. *Held*, that this did not constitute a representation that, at the time when the contract was made, there were bonds of the purchaser held by and guaranteed by the corporation designated, but constituted a promise that, when the notes of the purchaser were issued, such bonds would be ready for delivery as security.

It therefore further was *held* that, the contract containing no representation of the existence of such bonds at the time when it was made, an action for deceit could not be maintained against one who signed the contract on behalf of the purchaser, based on the allegation that when the contract was signed the bonds were not in existence.

TORT for deceit, as described in the opinion. Writ dated August 21, 1916.

In the Superior Court the action was tried before *McLaughlin*, J. Material evidence is described in the opinion. At the close of the evidence, on motion of the defendant, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*P. M. Lewis*, for the plaintiff.

*H. L. Barrett*, for the defendant.

*PIERCE*, J. This is an action of deceit to recover damages from the defendant suffered by the plaintiff by reason of its reliance upon certain alleged false representations of fact contained in a written contract between the plaintiff and the Vinal Haven Electric Power Company.

The instrument of agreement was in the form of a proposal "to furnish and deliver . . . within four weeks after approval of drawings, the machinery described in the schedule and specifications attached hereto and made a part hereof, at the price named in said schedule." February 1, 1915, the proposal was accepted and signed "Vinal Haven Electric Power Co. T. E. Libby, Treas." and February 5, 1915, it became operative as a contract when signed "Wheeler Condenser and Engineering Company, Approved, . . . By Thos. Bostocke, Treas." The machinery referred to in the contract was shipped by the plaintiff to the defendant, was duly delivered, and it is admitted that the prices specified in the contract were reasonable.

The contract provided that "Payments [were] to be made in four months' notes bearing interest at 6% — notes to be secured by Purchasers' bonds held by and guaranteed by Liggett, Hitchborn & Co. Inc." After the delivery of the machinery the purchaser sent the seller two notes, to cover the first payment of fifty per cent and the second payment of thirty per cent, and never sent a note to cover the remaining twenty per cent. It did not send with either note its bonds and the plaintiff has been unable to collect anything on the notes. It was admitted that no bonds of the Vinal Haven Electric Power Company were held by or guaranteed by Liggett, Hitchborn & Co. Inc., at the time the contract was signed. The evidence would warrant a finding that no bonds were in existence when the contract was signed

or at the time when the notes were, and were to be, delivered to the plaintiff.

We think the clause "Payments to be made in four months' notes bearing interest at 6% — notes to be secured by Purchasers' bonds held by and guaranteed by Liggett, Hitchborn & Co. Inc." as a matter of interpretation must be read connectively, and that, so read, they constitute a promise to have bonds "held by and guaranteed by Liggett, Hitchborn & Co. Inc." ready for delivery to the plaintiff as security for the notes which were to be given by Vinal Haven Electric Power Company to the plaintiff, should the plaintiff "within four weeks after approval of drawings" furnish and deliver the machinery described in the schedule and specifications "f. o. b. cars Carteret, N. J." It follows that when the contract became operative the quoted words cannot be construed to have been a representation that the bonds were then in physical existence, or, if so, that they then were held and guaranteed by Liggett, Hitchborn & Co. Inc. *Brown v. C. A. Pierce & Co.* 229 Mass. 44, 47. *Dawe v. Morris*, 149 Mass. 188, 191. *Knowlton v. Keenan*, 146 Mass. 86, 88.

*Exceptions overruled.*

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JOSEPH BRESS vs. ABRAHAM GERSINOVITCH & others.

Suffolk. November 18, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Equity Jurisdiction*, To reach and apply property conveyed with intent to defeat, delay or defraud creditors. *Execution. Attachment.*

The right given to a creditor under R. L. c. 159, § 3, cl. 8, to maintain a suit in equity to reach and apply in satisfaction of a debt property conveyed by the debtor with intent to defeat, delay or defraud his creditors is concurrent with his right given by R. L. c. 178, §§ 1, 47, to levy an execution obtained against the debtor in an action at law upon land of the debtor so conveyed.

Where the bill in such a suit alleges that, by order of a municipal court in poor debtor session, the debtor had assigned to the plaintiff all his right, title and interest in the land so conveyed by him, and that, at a sheriff's sale after a levy of his execution in the action at law upon the land, it was sold to the plaintiff, a demurrer by the defendant on the ground that the plaintiff has a complete and adequate remedy at law will not be sustained, because the assignment by the debtor conveyed no legal or equitable title as against the debtor's grantee,

and the sale on execution gave only a right to try the title of the defendant or fraudulent grantee by a writ of entry commenced within one year after the return day of the execution.

**BILL IN EQUITY**, filed in the Superior Court on April 11, 1918, to reach and apply under the provisions of R. L. c. 159, § 3, cl. 8, certain real estate alleged to have been conveyed fraudulently by the defendant Abraham Gersinovitch to the defendants Rosie A. and Myer H. Gersinovitch with intent to defeat, delay and defraud the creditors of Abraham.

The allegations of the bill are described in the opinion. The defendants demurred. The demurrers were heard by *Wait, J.*, and a decree was entered sustaining them and dismissing the bill. The plaintiff appealed.

*P. B. Kiernan*, for the plaintiff.

No counsel appeared for the defendants.

**PIERCE, J.** This is an appeal from a final decree sustaining a demurrer to the plaintiff's bill.

The bill was brought under R. L. c. 159, § 3, cl. 8, to enforce the plaintiff's right as a creditor to take and apply in payment of the judgment debt of the defendant Abraham Gersinovitch, three parcels of land which were purchased by the debtor, but conveyed to Rosie A. and Myer H. Gersinovitch with intent to defeat, delay or defraud the creditors of Abraham Gersinovitch. Before the bill was filed the defendant debtor, by order of the Municipal Court of the City of Boston in poor debtor session, had assigned to the plaintiff all his right, title and interest in and to the three parcels of land conveyed to the other defendants, and the assignment had been duly recorded. Upon demand the defendants had refused to surrender the premises or to pay the amount due on the execution. The plaintiff had also before filing the bill brought an action against the debtor on the judgment, made a special attachment of the parcels of land standing in the name of Rosie A. and Myer H. Gersinovitch, and recovered judgment for \$123.84, for which amount execution duly issued and a levy on execution was made on the premises mentioned by the sheriff, and subsequently sold October 13, 1917, by the sheriff to the plaintiff by deed duly recorded.

The right of the plaintiff to proceed in equity is expressly given by R. L. c. 159, § 3, cl. 8, and is concurrent with the right

to levy an execution under R. L. c. 178, §§ 1, 47. The assignment of the debtor as against the grantees could convey no legal or equitable title. The sale on execution gave a mere right to try the title of the defendants as fraudulent grantees, by a writ of entry commenced "within one year after the return day of the execution;" otherwise the levy and the plaintiff's rights were void by the terms of R. L. c. 178, § 47. *Cuniff v. Parker*, 149 Mass. 152, 153.

It is plain the demurrer should not be sustained on the grounds assigned, to wit, that the plaintiff has a complete and adequate remedy at law in that the debtor defendant has conveyed to the plaintiff all his right, title and interest in the real estate; and because the plaintiff has sold the property to himself by virtue of the execution levied on said real estate.

The right to maintain the suit in equity is expressly conferred by statute, and is concurrent with the statutory right to proceed after levy and sale on execution by a writ of entry. *Stratton v. Hernon*, 154 Mass. 310, 312. *Thomas v. Burnce*, 223 Mass. 311, 312. There is no legal reason why at pleasure the plaintiff may not elect to pursue the right given him by R. L. c. 159, § 3, cl. 8, and before satisfaction of his execution abandon any other statutory and common law remedy.

*Decree reversed with costs.*

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CATHERINE POWERS *vs.* INHABITANTS OF WAKEFIELD.

NELLIE T. MURPHY *vs.* SAME.

MARY MURPHY *vs.* SAME.

Middlesex. November 19, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence, In use of gas.*

At the trial of an action against a town which made and sold illuminating gas to its inhabitants, including the plaintiff, for personal injuries alleged to have been caused by the fumes of illuminating gas escaping upon the plaintiff's premises through negligence of the defendant's employees, there was evidence that, having been notified by the plaintiff of insufficiency in the flow of gas, the defendant's employees undertook and performed the duty "of blowing an accumulation

of gas water out of the supply pipe running from the defendant's gas main" into the plaintiff's cellar, that in doing so they permitted two teaspoonfuls of "water drip" to run upon the cellar floor. An experiment tried before the jury in the court room, when two teaspoonfuls of "water drip" were poured upon a piece of blotting paper, showed that an odor immediately was produced which so permeated the court room with the odor of illuminating gas that the windows were ordered opened. A physician and expert called by the plaintiff testified that in his opinion the vapors rising from the "water drip" spilled upon the plaintiff's cellar floor caused the plaintiff's sickness. *Held*, that there was evidence of negligence of the defendant's employees in permitting the "water drip" to be spilled upon the cellar floor, in not removing it after it was spilled, and in not airing the cellar to rid the premises of the noxious vapors and fumes, and that a finding was warranted that such negligence caused the plaintiff's injuries.

THREE ACTIONS OF TORT for personal injuries alleged to have resulted from illuminating gas caused, by negligence of employees of the defendant, to escape upon premises occupied by the plaintiffs. Writs dated May 8, 1915.

The actions were tried together in the Superior Court before *Keating, J.* The evidence is described in the opinion. At the close of the evidence the judge denied motions of the defendant that verdicts be ordered for it. The jury found for the plaintiffs in the sums of \$500, \$250 and \$150 respectively; and the defendant alleged exceptions.

*M. E. S. Clemons*, for the defendant.

*J. A. Pagum*, for the plaintiffs.

*BRALEY, J.* It was admitted by the defendant town that it makes and sells gas to the inhabitants, and that the duty "of blowing an accumulation of gas water out of the supply pipe running from the defendant's gas main" to the dwelling house occupied by the plaintiffs, was undertaken and performed by its servants during the afternoon of the day when the alleged injuries were suffered for which they severally seek damages. The jury properly could find that the odor of gas pervaded the house to such an extent, and that the gas was of such a noxious character as to cause the sickness complained of, and that the plaintiffs were not shown to have neglected any reasonable precautions to protect themselves from its effects. *Finnegan v. Fall River Gas Works Co.* 159 Mass. 311.

But if the question of the plaintiffs' due care was one of fact, the defendant contends there is no evidence of its negligence. The defendant, having been notified that the flow of gas through

the fixtures was not of sufficient volume, sent workmen to the place who unscrewed a plug in the gas pipe where it entered the house on the inside of the cellar wall, and as the plug was removed about two teaspoonfuls of a substance known as "water drip" which emits an odor similar to and practically indistinguishable from illuminating gas, ran out on to the cellar floor. The defendant offered evidence that this substance was harmless, and contended that, there being no proof of any leakage or escape of gas from the pipes, the plaintiffs could not recover. The plaintiffs' physician and expert however testified, that in his opinion the vapors arising from the gas pipes, meaning the drip on the cellar floor, caused the plaintiffs' sickness. And the jury could say that the experiment in their presence when, two teaspoonfuls of the substance having been poured on a piece of blotting paper, an odor was immediately produced which so permeated the court room that the windows were ordered open, tended strongly to confirm his opinion, as well as to illustrate its pungent and deleterious quality. It was the duty of the defendant when removing such a substance under the conditions described to use reasonable diligence to prevent harm to the inmates of the house, and whether that duty had been performed by leaving the drip on the floor when it could have been placed in a suitable receptacle and taken away or the cellar windows opened, also was for the jury. *Holly v. Boston Gas Light Co.* 8 Gray, 123.

*Exceptions overruled.*

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CHARLES O. TIMSON vs. ALDINE O. PARROTT.

Essex. November 19, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Contract, Validity, Consideration.*

In an action on an agreement in writing to pay to the plaintiff the balance remaining unpaid on a promissory note, given to the plaintiff by a bankrupt corporation, after "a dividend" is paid on such note, there was evidence on which it could be found that the plaintiff held the promissory note of the defendant for \$150, that, at the request of the defendant, he surrendered this note and



received instead the promissory note of the corporation, then about to become bankrupt, for the same amount and also received the written promise of the defendant sued upon, that after proceedings in bankruptcy the plaintiff received on the note of the bankrupt corporation a dividend of \$15 and that the proceedings in bankruptcy were closed. It further appeared that the amount of \$150 originally lent by the plaintiff to the defendant, for which the defendant's note was given, was procured for and wholly expended for the benefit of the corporation that afterwards became bankrupt. *Held*, that the contract was a valid one, the consideration for the defendant's promise being the surrender by the plaintiff of the defendant's note in exchange for the note of the corporation, and that the plaintiff was entitled to go to the jury.

CONTRACT on an alleged agreement in writing, described in the opinion, to pay the plaintiff a balance of \$135 remaining unpaid on a promissory note of the Hub Curtain Company for \$150. Writ in the District Court of Southern Essex dated January 23, 1915.

On appeal to the Superior Court the case was tried before *Sanderson, J.* The facts favorable to the plaintiff which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. A verdict for the defendant should be directed by the court.

"2. The plaintiff's action is prematurely brought.

"3. If the plaintiff ever lent the defendant \$150, then said debt was paid by a note of the Hub Curtain Company.

"4. The allegations set forth in the plaintiff's declaration constitute a fraud and the plaintiff cannot recover on the agreement set forth in the second paragraph of his declaration.

"5. If the jury find that the plaintiff agreed with the defendant to prove in bankruptcy a claim against the Hub Curtain Company which was not a valid claim, he cannot recover in this action.

"6. The plaintiff cannot recover for money alleged to have been lent to the defendant on or about October 21, 1910.

"7. If a note was executed by the defendant to the plaintiff on or about October 21, 1910, and this note was surrendered by the plaintiff for a note of the Hub Curtain Company, then this alleged note of the defendant given on or about October 21, 1910, was paid.

"8. The plaintiff, having elected to prove his claim in bank-

ruptcy against the Hub Curtain Company, cannot press his claim against the defendant.

"9. In the absence of evidence that the plaintiff will receive no more dividends from the Hub Curtain Company's bankrupt estate, he cannot recover on the alleged agreement set forth in the second paragraph of his declaration."

The judge refused to make any of these rulings. In regard to the seventh ruling requested by the defendant the judge instructed the jury as follows: "The claim is that the corporation bought up the old note and the old note was surrendered for the purpose — one purpose, at any rate — of having the substituted note proved in bankruptcy to get a dividend, with the collateral agreement on the part of this defendant that he personally would pay any difference between the amount of the dividend and the amount due on the note. If there was such a purchase and it was a genuine transaction, a real transaction such as might take place where one man buys up a note, or buys it by giving another note for it, then from that time on the debt would be the debt of the Hub Curtain Company and not the personal debt of the defendant; and from that time on the only possible reliance the plaintiff could have on the defendant would be by reason of an agreement to pay a balance, and that would have to be based upon a consideration, and a legal consideration." The defendant excepted to this portion of the charge.

The judge submitted to the jury seven special questions, which, with the answers of the jury, were as follows:

"1. Did the defendant Parrott at any time execute and deliver to the plaintiff his personal note for the money advanced by the plaintiff for the Hub Curtain Company?" The jury answered, "Yes."

"2. Was the note in evidence given as a substitute for and in settlement of a note previously held by the plaintiff?" The jury answered, "Yes."

"3. Did the Hub Curtain Company owe the plaintiff the amount of the claim which he proved against it in the bankruptcy case?" The jury returned no answer.

"4. Did the defendant Aldine O. Parrott on or about February 24, 1911, promise the plaintiff to pay a debt due him from the Hub Curtain Company?" The jury answered, "Yes."

"5. If such a promise was made, was it in writing?" The jury answered, "Yes."

"6. If such promise was made, was there a consideration for it?" The jury answered, "Yes."

"7. Were the bankruptcy proceedings in the case of the Hub Curtain Company closed at the time this case was brought?" The jury answered, "Yes."

The jury returned a general verdict for the plaintiff; and the defendant alleged exceptions.

*J. H. Duffy*, for the defendant.

*N. D. A. Clarke*, for the plaintiff.

PIERCE, J. The evidence taken in its aspect most favorable to the contention of the plaintiff would warrant the jury in finding that on October 21, 1910, the plaintiff lent the defendant, personally, \$150 to enable the defendant to meet the payroll of the Hub Curtain Company; that a few days before the note became due the defendant asked and received an extension "because he had n't sufficient funds to meet it;" that later the defendant telephoned the plaintiff that the Hub Curtain Company had assigned, and asked the plaintiff "to give up his personal note and accept the note of the Hub Curtain Company" in payment; that the Hub Curtain Company was "contemplating going into bankruptcy proceedings" and that the common law assignee of the Hub Curtain Company would make arrangements with the plaintiff to that effect; that the assignee, appointed in January, 1911, agreed with the plaintiff that the personal note of the defendant should be surrendered and a substituted note "drawn on the Hub Curtain Company" should be delivered to the plaintiff together with a written agreement signed by the defendant to pay the plaintiff any balance unpaid on the substituted note after "a dividend" was received; that afterwards the assignee gave and the plaintiff received the note of the Hub Curtain Company as a substitute for and in settlement of a note previously held by the plaintiff; that at the time the note of the Hub Curtain Company was substituted for the personal note of the defendant, and the last named note surrendered, as a part of his agreement the assignee gave the plaintiff a written agreement, signed by the defendant, the substance of which was that the defendant was indebted to the plaintiff in the sum of \$150; that the plaintiff should give up the

personal note and accept the Hub Curtain Company's note, and that "as soon as a dividend was paid" to him the defendant would pay the plaintiff the difference between the dividend and the amount the defendant owed; that the Hub Curtain Company filed a petition and was adjudicated a bankrupt on February 6, 1911; that the petition scheduled the plaintiff as a creditor holding the bankrupt's note for \$150; that on February 24, 1911, the plaintiff executed a proof of claim, which was filed and allowed; that a dividend of ten per cent was declared and paid on April 11, 1911; that no other dividend has been declared; that the defendant has not paid the balance of \$135, and that the absence of evidence of other proceedings in the bankruptcy court warrants a finding that the proceedings in that court were closed at the time this action was brought.

Upon the above alleged facts, many of which are disputed by the defendant, the judge rightly could not have directed a verdict for the defendant. The surrender of the individual note of the defendant for the note of the bankrupt Hub Curtain Company was in itself a consideration for the written promise of the defendant to pay the plaintiff the difference between a declared dividend and the amount owed the plaintiff, \$135, "as soon as a dividend was paid" the plaintiff. There is no evidence in the record that the note of the Hub Curtain Company was given the plaintiff without the authority of the company. Indeed, the contrary may be inferred readily from the undisputed fact that the money obtained from the plaintiff was procured and used for the direct benefit of the company. Manifestly the fund available to the general creditors of the company could not be affected by the substitution of the plaintiff as a creditor in place of the defendant, if the amount owed the defendant was equal to or more than the obligation in its substituted form.

The action was not prematurely brought, in that it could rightly be found that the proceedings in bankruptcy had been closed before the action was brought; as also that the written agreement is to pay as soon as "a dividend" is paid and not when all proceedings have closed.

The remaining requests were refused rightly and are covered by what has been said concerning the motion to direct a verdict.

*Exceptions overruled.*

ANNIE J. BRADLEY vs. BAY STATE STREET RAILWAY COMPANY.  
ELMER E. BRADLEY vs. SAME.

Essex. November 19, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence, Contributory.*

A woman, who, before the enactment of St. 1914, c. 553, walked slowly across a street railway track in front of a moving street railway car that she had seen forty feet away and which she could have seen was very near her before she walked in front of it, and was injured by being knocked down by the car, cannot maintain an action against the corporation operating the car for her injuries.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained on April 26, 1913, by being knocked down by a street railway car of the defendant when the plaintiff was attempting to cross Washington Street in Haverhill at its junction with Washington Square in that city, and the second action by the husband of the plaintiff in the first case for expenses incurred by reason of her injuries. Writs dated August 2, 1913.

In the Superior Court the cases were tried together before *Bell, J.* The evidence upon the question of the due care of the plaintiff in the first case is described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to order a verdict for it on the grounds that there was no evidence that negligence of the defendant was a contributory cause of the accident and that there was no evidence that the plaintiff in the first case was in the exercise of due care at the time of the accident. The judge denied the motion and submitted the cases to the jury, who returned a verdict for the plaintiff in each case, in the first case in the sum of \$600 and in the second case in the sum of \$400. The defendant alleged exceptions.

The cases were submitted on briefs.

*J. P. Sweeney, I. W. Sargent & A. Sweeney*, for the defendant.  
*W. S. Peters, H. J. Cole & F. H. Magison*, for the plaintiffs.

PIERCE, J. We are of opinion that the plaintiff in the first case was not in the exercise of due care.

As concerns her conduct the facts are as follows: At about ten o'clock P. M. April 26, 1913, the plaintiff, with her sister-in-law, stood on the south side of Washington Street, Haverhill, in front of the Hotel Thorndike, at or near the crossing, waiting for a car going east on which the sister-in-law intended to be a passenger. Two cars came from the west going east on the southerly track, and came to a stop so that the rear end of the forward car was on the easterly side of the crossing and the forward end of the rear car was on the westerly side of the crossing. The two ladies then left the sidewalk and proceeded on the crossing until near the southerly rail, when the plaintiff's companion went to the rear of the rear car, the plaintiff waiting until her companion was putting her foot up on the rear platform of the car. Meanwhile the forward car had started away from the crossing, and the plaintiff looked down the street and saw the car that subsequently struck her standing, or moving from the east, just beyond the switch which was distant one hundred feet easterly from the crossing. The plaintiff then started to walk along the crossing in front of the rear car. When she started she stood close to the southerly rail, and the distance between that point and the southerly rail of the west bound track was about nine feet and seven inches. She passed in front of the rear car, over a space of four feet and ten inches between the tracks, and was struck by a west bound car when she reached the middle of that track. When the plaintiff passed in front of the rear car, the car that struck her was distant from the crossing "forty feet down the street." She did not look at the car after she saw it beyond the switch or pay any further attention to it after she stopped to walk slowly over the crossing which led over the west bound track. With the passing of the forward east bound car there was no obstruction to the view of the plaintiff, and she could have seen that the car was very near her before she walked in front of it. The case is governed by *O'Brien v. Boston Elevated Railway*, 217 Mass. 130, *Adams v. Boston Elevated Railway*, 219 Mass. 515, *Garabedian v. Worcester Consolidated Street Railway*, 225 Mass. 65, 66, and cases cited.

It becomes unnecessary to determine whether the defendant was negligent.

Judgment to be entered for the defendant. St. 1909, c. 236, § 1.

*So ordered.*

THOMAS A. KELLY & another, administrators *de bonis non* with the will annexed, *vs.* JAMES M. MORRISON.

FRANK F. ROGERS, JR., & others *vs.* SAME.

Suffolk. November 20, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Name. Partnership. Equity Jurisdiction.* To enjoin use of name of deceased partner, Laches. *Limitations, Statute of. Executor and Administrator.*

St. 1853, c. 156, now in substance R. L. c. 72, § 5, which provides that, "A person who carries on business in this Commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives," gives a right to the executor or administrator of the estate of a deceased partner which before the passage of the statute was unknown to the common law or in equity, and under the next section of this statute the executor or administrator of the estate of a deceased partner can maintain a suit in equity to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business.

Such a suit in equity may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. Following *Bowman v. Floyd*, 3 Allen, 76.

By the statute named above the right to maintain a suit in equity to enjoin the continuance of the use of the name of a deceased partner is given only to "his legal representatives," and former partners of a firm that used the name of the deceased after his death cannot maintain such a suit.

BILL IN EQUITY, filed in the Superior Court on May 6, 1918, by the administrators *de bonis non* with the will annexed of the estate of Thomas Kelly, late of Boston, against one who was a partner of the plaintiff's testator at the time of his death, praying that the defendant be restrained by injunction from using in his business the name of the plaintiff's testator, and for an accounting; and another

BILL IN EQUITY, filed in the Superior Court on the same day, by persons who, after the death of Thomas Kelly, were with the defendant the members of a partnership doing business under the firm name of Thomas Kelly and Company, praying for an injunction restraining the defendant from using the firm name of Thomas Kelly and Company, and for an accounting.

The cases were heard together by *Fox, J.*, upon an agreed statement of facts relating to both of them, which contained the facts that are stated in the opinion. The judge in each of the cases, with the consent of the parties, reported the case and all questions of law therein for determination by this court.

St. 1853, c. 156, was as follows:

"Sect. 1. No person carrying on business in this Commonwealth, shall assume or continue to use in his business the name or names of any person or persons formerly connected with him in partnership, or of any other person or persons, either alone or in connection with his own or any other name or designation, without the consent of such person or persons, or of his or their legal representatives, in writing.

"Sect. 2. The Supreme Judicial Court shall have power in equity to restrain by injunction the use of any person's name in violation of this act."

R. L. c. 72, § 5, is quoted in full in the opinion.

Section 6 of that statute is as follows: "The Supreme Judicial Court or the Superior Court shall have jurisdiction in equity to restrain the use of names or labels in violation of the provisions of this chapter."

*J. F. Sullivan*, for the plaintiffs.

*G. R. Nutter*, (*G. C. Coleman* with him,) for the defendant.

PIERCE, J. These cases were argued together and may be disposed of by a single opinion. In each case the plaintiffs seek to enjoin the defendant from the use of the name Thomas Kelly in connection with his business in the cities of Boston, New York and Chicago. The cases are before this court on report.

The agreed facts applicable to both cases are, in substance, as follows: On December 1, 1892, the defendant Morrison became a partner with Thomas Kelly and one Maguire, under the name of Thomas Kelly and Company. Kelly died in 1893. Maguire and Morrison continued the business under the same firm name until the death of Maguire in 1895. On December 1, 1895, Morrison formed a new partnership with other partners, and continued the business with various partners, and finally with the plaintiffs Hennessey, Rogers and Jenkins under the same firm name of Thomas Kelly and Company until the expiration of the last partnership on November 30, 1917. On December 1, 1917, a bill



was filed by Morrison against the other partners, a receiver was appointed, and all the right, title and interest of the defendants in and to the personal property of the partnership were transferred to the receiver, who conveyed the same to Morrison. After the conveyance by the receiver, Morrison sent out to all customers whose names appeared on the books of the old firm of Thomas Kelly and Company and to the trade generally a statement, dated May 1, 1918, which in substance read: "The late firm of Thomas Kelly & Co. has been dissolved. I have acquired the assets, business and good will, and am continuing the business . . . at the same address, and under the same name of Thomas Kelly & Co." On May 1, 1918, the plaintiffs Rogers, Hennessey and Jenkins sent out to all the old customers of Thomas Kelly and Company and to the trade generally, a notice of the dissolution of the firm of Thomas Kelly and Company and that they had "formed a new partnership under the name of Rogers, Hennessey & Jenkins for the carrying on of the same line of business."

"The executor of the will of Thomas Kelly was his partner, Maguire, and after the death of Maguire, Thomas A. Kelly and Thomas J. Kelly, the plaintiffs, were appointed administrators *de bonis non* in 1895. The right to the use of the name Thomas Kelly does not appear as an asset on any inventory of the estate of Thomas Kelly, nor is it included in the first and final account of the administrators *de bonis non*, which was filed in 1916, duly assented to by all persons interested therein. The administrators *de bonis non* have at all times known that, after the death of Thomas Kelly, Morrison continued the business and has continued it under the same firm name with different partners since December, 1895. During that period, Morrison has sent out circulars and price lists regularly to the trade, and has advertised somewhat in trade papers, and the sales of the business have almost doubled from 1895 to 1917. The name is of value, and its value has increased since 1895. Neither of the administrators has ever been engaged in a similar business, although Thomas A. Kelly was employed during the year 1896 by the firm which Morrison formed to succeed the old firm in which Thomas Kelly was a partner, and, since the sale of the business by the receiver to Morrison, Thomas A. Kelly has been employed by the firm of Hennessey, Rogers and Jenkins. The offices of the firm of

Thomas Kelly and Company since 1895 were in Chauncy Street, Boston, at the corner of Exeter Place, until the building burned in 1917, and after that destruction by fire were moved to the opposite corner, where Morrison is now conducting the business. No notice was ever given by the administrators *de bonis non* to Morrison to cease using the name Thomas Kelly until after April 12, 1918, after the conveyance of the business by the receiver to Morrison."

The right claimed by the plaintiffs to have enjoined the use of the name of their testator, is a right unknown to the common law and to courts of equity. As a remedial right it was first conferred upon a person and his legal representatives by St. 1853, c. 156, now R. L. c. 72, § 5. That statute reads: "A person who carries on business in this Commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives."

It is the contention of the defendant that the statute intended to provide for two classes of cases, — the first, where there is an assumption of a name; the second, where there is a continuance of the use of a name by a person or persons who once had the right to use it in connection with the owner of it. And it is argued that the intent of the statute is expressed by the simple word "use" without the phrase "assume or continue to use." Should this construction of the legislative intent be adopted it is plain the phrase "assume or continue to use" could not be interpreted to mean "shall not assume and continue to use," as it manifestly was interpreted to mean in *Bowman v. Floyd*, 3 Allen, 76, 80. The Legislature has re-enacted the statute of 1853 at least twice since the decision in *Bowman v. Floyd*, without substantial change, and the judicial construction then put upon it is now a part of the statute, if the intent thereof was ever a question of doubt. *Nichols v. Vaughan*, 217 Mass. 548, 551.

*Bowman v. Floyd* decided that "the statute forbids not only the assumption but the continued use of the name of another person without consent first duly obtained." It also is authority for the proposition that that person or his legal representatives "must

necessarily have the right at any time at their pleasure to avail themselves of the remedy given them [him] by the statute to cause the use to be restrained by injunction." The defendant suggests that perhaps *Bowman v. Floyd* goes no further than to decide under the plea of the statute of limitations and the facts which sustained that plea, that the Legislature "did not intend mere lapse of time without else to bar the right of the representatives to enjoin the use of the name," and that there is nothing in that decision "to prevent a court of equity from considering the equitable doctrines of estoppel and laches." An examination of the original papers in that case shows the question of the effect of an acquiescence for almost eight years upon the plaintiffs' right to maintain the bill was argued to the court, as well as the statute of limitations. If under the statute the plaintiffs "must necessarily have the right at any time at their pleasure to avail themselves of the remedy," they cannot be said to have slept upon their rights because they take advantage of the full remedy which the law allows. In a word, the wrong of the defendant consists of a series of acts, and is not a single act with a continuance. It is not argued and there is nothing in the agreed facts to warrant a defence that the plaintiffs, by acquiescence, have abandoned their right to the intervention of equity, so far as the act is in progress and lies in the future. *Menendez v. Holt*, 128 U. S. 514. The doctrine of estoppel cannot be evoked as a defence; the plaintiffs have not stood by and encouraged the defendant to act upon the belief that they had no right or had abandoned it. In legal contemplation the defendant knew the plaintiffs could avail themselves of the remedy at any time.

The plaintiffs in the second case are not persons who are entitled to the right and remedy conferred by the statute. *Lodge v. Weld*, 139 Mass. 499.

It follows that in the second case the bill should be dismissed with costs; and in the first case a decree of injunction should issue restraining the defendant from the use of the name Thomas Kelly in connection with his business, except as it shall be used to indicate his succession to the business of Thomas Kelly and Company.

*Decree accordingly.*

FRANCES E. COFFIN & another, trustees, vs. ATTORNEY GENERAL  
& others.

Essex. November 20, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, & PIERCE, JJ.

*Devise and Legacy. Power. Charity.*

A testator by his will disposed of the residue of his estate as follows: "The remainder of my Property both real and personal I give in Trust to my wife F E C & M E C to be used by them if their real wants are not supplied from any failure of income from their own property to give them a generous support or L M C or any other near relative the interest on the same to be used as it is needed for such purposes. My will & wish is that my wife, daughter & L M C have every needed want supplied & to this end they may use this trust so far as it is necessary if their own property does not supply all their wants & any & all interest left after paying any such extra wants it is my will & shall be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose." F E C, the testator's widow, waived the provisions for her benefit in his will, and continued to live. M E C, the testator's daughter, died, without having made any appointment under the above residuary clause. L M C also died. On a bill for instructions by the trustees under such residuary clause, it was *held*, that a valid trust for charitable purposes was created in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries, that the power of appointment to designate the charities vested in the testator's widow and his daughter and could be exercised by the widow as the survivor of them and that the trustees should be ordered to distribute and pay over the residue to such charitable organizations as the widow as such survivor of the donees of the power should appoint.

In the suit described above it appeared that, before the filing of the bill, the widow had made an attempted execution of the power by deed, but in such attempt had provided for a payment for the benefit of a private trust and also had provided that the instrument of appointment should become operative only when a ratification of it by a decree of the Probate Court should become absolute, and it was *held* that the attempted appointment to the private trust was void, but that this instrument did not prevent a new appointment by the widow in conformity with the terms of the power.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on February 9, 1918, by the trustees under the eighth and residuary article of the will of Charles H. Coffin, late of Newburyport, for instructions as to the distribution of the trust fund under the circumstances stated in the opinion.

The Probate Court made a decree that the fund in the petitioners' hands, both income and principal, should be paid forthwith to such charitable organizations as Frances E. Coffin, the testator's widow, should appoint. The administrator of the estate of Mary E. Coffin, who was the testator's daughter, appealed.

In the Supreme Judicial Court the case was heard by *Carroll, J.*, who found that the facts were as stated in the agreed facts and ordered that the decree appealed from be affirmed. At the request of the appellant the single justice reported the case for determination by the full court.

*H. I. Bartlett*, for the appellant.

*A. H. Wellman*, (*C. Bosson & P. I. Lawton* with him,) for the American Missionary Association and others.

**BRALEY, J.** The testator, after creating certain trusts which were to continue during the lives of the respective beneficiaries and making pecuniary gifts to several charities, provided in the eighth or residuary clause of his will that, "The remainder of my Property both real and personal I give in Trust to my wife Frances E. Coffin & Mary E. Coffin to be used by them if their real wants are not supplied from any failure of income from their own property to give them a generous support or Lizzie M. Coffin or any other near relative the interest on the same to be used as it is needed for such purposes.

"My will & wish is that my wife, daughter & Lizzie M. Coffin have every needed want supplied & to this end they may use this trust so far as it is necessary if their own property does not supply all their wants & any & all interest left after paying any such extra wants it is my will & shall be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose."

The widow, who is living, having waived the provisions made for her and the daughter having died intestate and Lizzie M. Coffin being deceased, the question for decision is whether a valid charity exists or whether the fund should be turned over to the administrator of the daughter who was the testator's only heir at law.

The difficulties which prevented the establishment of either a

private trust or charity in *Minot v. Attorney General*, 189 Mass. 176, where, the testator having included uses which were not charitable, the description of the beneficiaries was too indefinite to sustain a private trust and a resulting trust therefore arose in favor of the testator's next of kin, are not found in the present will. The testator says that he gives the remainder in trust, the primary purpose of which was that if their own property was insufficient his wife and daughter and Lizzie M. Coffin should "have every needed want supplied," even if the entire property should be thereby exhausted. But this is not the only object which he had in mind. If any part or the whole of it remains then the principal is to be devoted to missions, "& like good objects" as his wife and daughter may think best "knowing as they do my purpose." While the testator omits to name specifically organizations he wishes to benefit, the selection of which is left to others, yet where the gift is to charity the omission is insufficient to defeat his clearly expressed intention. *Minot v. Baker*, 147 Mass. 348. *Wilcox v. Attorney General*, 207 Mass. 198, 199. And the power conferred on his wife and daughter as trustees to designate charities having been coupled with an interest, could be rightfully exercised by the widow after her daughter's death. *Parker v. Sears*, 117 Mass. 513. *Lorings v. Marsh*, 6 Wall. 337.

The instrument however by which she purports to exercise the power, not only appoints a portion of the fund to "Helen W. Coffin as she is trustee for the benefit of Hattie Coffin," but is not to become operative until a decree of the court of probate directing the payments as designated becomes absolute. It is plain that the appointment for the benefit of a private trust is excessive and void. *Loring v. Wilson*, 174 Mass. 132. But this does not prevent a re-execution in conformity with the terms of the power. *Carver v. Richards*, 27 Beav. 488.

The result is that, a valid trust for charitable purposes was created in so much of the testator's property as was not required for the support of the individual beneficiaries, that the power of appointment vested in the wife and daughter to designate the charities and could be exercised by the survivor, and that the time for final distribution has arrived.

The decree of the court of probate that the trustees are forthwith to distribute and pay over the property to such char-

itable organizations as the survivor of the power may appoint should be affirmed, but no costs on the appeal are to be taxed as between solicitor and client.

*Ordered accordingly.*

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BENJAMIN H. BENTON vs. PAUL B. WATSON, trustee.

Suffolk. November 22, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Negligence*, Contributory negligence, Invited person. *Evidence*, Presumptions and burden of proof.

Where, at the trial of an action for personal injuries suffered by the plaintiff after the enactment of St. 1914, c. 553, due to a fall in a building under the defendant's control in which the plaintiff was at the defendant's invitation, the only evidence shows that the premises were strange to the plaintiff and were very dark, that he knew and appreciated the degree of darkness, was in no way misled by any act or omission of the defendant and had no false sense of safety, but went ahead nevertheless and fell down steps which he did not see, a verdict must be ordered for the defendant, because the only reasonable inference to be drawn from the evidence is that negligence of the plaintiff contributed to his injury.

TORT for personal injuries suffered by the plaintiff on February 2, 1917, by reason of a fall down unlighted steps inside the Boston Opera House, which at that time was under the legal control of the defendant. Writ dated April 10, 1917.

In the Superior Court the case was tried before *White, J.* At the close of the plaintiff's evidence, the defendant moved that a verdict be ordered for him. The judge granted the motion and reported the case for determination by this court, with the stipulation that, if the ruling was right, final judgment was to be entered for the defendant on the verdict, but, if the action should have been submitted to the jury, then a verdict was to be entered for the plaintiff in the sum of \$1,250.

The case was submitted on briefs.

*R. J. Crowley, J. H. Vahey & S. K. Casson*, for the plaintiff.

*E. C. Stone*, for the defendant.

*PIERCE, J.* The duly authorized agent of the defendant invited the plaintiff to call on him on business, at the Boston Opera House,

the place of business of the defendant. He said he "was there all the time;" there was no "show on," and directed the plaintiff to "Come up, if the front door ain't open, come round the back and come up;" "if you can't get in the front door, come around the back and come upstairs." The plaintiff had never seen the opera house. He went up and tried the doors and saw no light, tried around the corner. He stepped back from the building to see if he could see any light, saw a young man at the window and told him he wanted to get in. The young man said "Come round the back;" and he went back. The plaintiff testified: "I went way to the rear, through a door, I never had been there, said stage door. I went through a sort of shed first, I don't know whether it had been built there, — for what purpose, but I reached the rear, what is called the private entrance, stage door. . . . I went in. . . . I stepped in the stage door, walked in there, — so of course I thought somebody would be there, I saw nobody, I looked around, — very dark, and to the right of me looked like a little office and I stepped over. I says, 'Anybody here?' Nobody answered; I looked round. I kept hollering, 'Is anybody here?' Then I stepped to go to the front, went to go upstairs, I supposed to the front of the house and kept hollering, 'Is anybody here? Is anybody here?' I kept going forward all the time; nobody answered me . . . until finally [I] . . . stepped off into space and fell," where some steps went down. He further testified that "after he passed the stage door he turned to the left to go to the front; that there was not a bit of any light there in the hall, no artificial or natural light or anything, and when asked how far distant from him he could see, he said he could see just a little glimmer, and that he had to keep feeling his way, thinking perhaps after he got a little further there might be some light."

At the close of the evidence the presiding judge on motion of the defendant directed a verdict for the defendant, and reported the case for the determination of the full court, with the stipulation that "if my ruling and direction was right, then final judgment is to be entered for the defendant on the verdict, but if the case should have been submitted to the jury, that a verdict is to be entered for the plaintiff in the sum of \$1,250."

We think the verdict was directed rightly because, as a matter of law, the plaintiff was not in the exercise of due care. *Duggan v.*



*Bay State Street Railway*, 230 Mass. 370, 379. After entrance at the stage door, the plaintiff was in a strange building, in a hall that he had not before seen, which was "very dark," had "not a bit" of light, "no artificial or natural light or anything." The plaintiff knew and appreciated the measure and degree of darkness, he was not misled by any act or omission of the defendant, and he knew as all men of ordinary experience must know that one who walks in the total darkness of a strange hall is likely to encounter obstructions to his passage and pitfalls to his feet. The case at bar is like *Campbell v. Abbott*, 176 Mass. 246; and is distinguished from *Humphreys v. Portsmouth Trust & Guarantee Co.* 184 Mass. 422, and *Marston v. Reynolds*, 211 Mass. 590, and other similar cases, by the absence of any fact which misled the plaintiff to a false sense of safety.

In accordance with the terms of the report, final judgment should now be entered for the defendant.

*So ordered.*

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COMMONWEALTH vs. SAMUEL C. HARRIS.

Middlesex. November 22, 1918. — January 3, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Constitutional Law*, Secrecy of grand jury proceedings. *Jury and Jurors.*  
*Practice, Criminal*, Grand jury proceedings. *Witness.*

An indictment found and returned by a grand jury upon testimony given before them by witnesses in the presence of other witnesses is a violation of art. 12 of the Declaration of Rights, although no person not a member of the grand jury was present while that body was deliberating upon the evidence presented. A plea in abatement to an indictment for crime on the ground that, while the grand jury were hearing testimony upon the subject matter of the indictment, other witnesses than the witness testifying were present in the grand jury room, must be sustained although it appears that such witnesses were present solely for the purpose of testifying and it is not shown that the defendant suffered any harm from their presence.

INDICTMENT, found and returned on November 22, 1917, charging that the defendant received an automobile knowing it theretofore to have been stolen.

The defendant filed a plea in abatement on the ground that, "while the grand jury was hearing, inquiring into, and examining the matter of the indictment, two police officers and other persons, not members of the grand jury and not authorized to be present, were present with the grand jury while it was so hearing, inquiring into, and examining said matter." The Commonwealth traversed the allegations of the plea and, in lieu of a hearing on the facts, the parties stipulated "that while the above entitled cause was being heard by the grand jury one or more persons, witnesses in the case, were in the grand jury room present while other witnesses were testifying; but that no witness or other person, not a member of the grand jury, was present while that body was deliberating upon the evidence presented."

The plea was heard by *Callahan, J.*, who ruled that, it not appearing in the stipulation that any of the persons present with the grand jury were there for any other purpose than to answer as witnesses when called, and it further not appearing that the defendant suffered any harm from their presence, the presentment was not vitiated and the indictment was valid. The plea accordingly was overruled.

After a trial the defendant was found guilty and alleged exceptions.

*H. H. Pratt*, for the defendant.

*N. A. Tufts*, District Attorney, *G. S. Harvey*, Assistant District Attorney, & *F. W. Fosdick*, Deputy District Attorney, for the Commonwealth.

PIERCE, J. It was decided in *Jones v. Robbins*, 8 Gray, 329, that the clause in art. 12 of the Declaration of Rights which reads: "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land," made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecution for felonies. In the opinion, delivered by Chief Justice Shaw, the court adopts the conclusion of Chancellor Kent that "'The words *by the law of the land*, as used originally in *Magna Charta* in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men,'"

and goes on to declare that "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

The above quotation is a declaration and decision that the twelfth article of the Declaration of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offences when, in truth, there was no sufficient cause to suspect their guilt. It is also a declaration that it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury, should the judges seek to overawe the latter or the witness by the presence of other witnesses or bystanders, or should he or they be of opinion the prosecution is too indulgently or too vindictively conducted. See Chitty Crim. Law, (2d ed.) 312, and cases cited. *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 771. Forsyth's History of Trial by Jury, 224.

It is manifest an examination of witnesses by the grand jury in the presence of others, — witnesses, bystanders or judges, — necessarily and inevitably subjects the accused to a public trial without right to testify in his own behalf or to be represented by counsel or attorney. It is equally plain such procedure destroys the force and vital principle of the oath which enjoins the grand jury to keep secret "the Commonwealth's counsel, your fellows' and your own." R. L. c. 218, § 5. The principle of secrecy is not impaired by permitting a grand jurymán, after the finding of an indictment, to testify that a witness on behalf of the prosecution testified differently on his examination before them from the testimony given by him before the jury of trial. *Commonwealth v. Mead*, 12 Gray, 167.

Since the failure of the judges in 1681, *Earl of Shaftesbury's Trial*, *supra*, to compel the grand jury by an open hearing to find a bill or indictment, the investigations have been invariably made in privacy. In England "The grand jury sit by themselves and hear

the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted." 1 Stephen's History of the Criminal Law of England, 274. Such has always been the procedure in Massachusetts until in recent years, in a few counties the grand jury at the instance of the district attorney has permitted persons to be present at the sessions of the jury other than the witness undergoing examination, the district attorney, his assistant and a stenographer appointed under R. L. c. 165, § 84, by a justice of the Superior Court "who shall be sworn and who shall take stenographic notes of such testimony given before the grand jury as he [the district attorney] may direct." The provision of the statute relating to the presence of a stenographer in the grand jury room, is a statutory recognition of the rule of exclusion which in its absence obtains.

The provision, in substance, that no person shall be held to answer for crimes above the grade of misdemeanor unless upon indictment, means an indictment found in the usual course of proceedings in pursuance of the methods of conducting the deliberations of grand jurors established by generations of procedure in England and in this Commonwealth. *Commonwealth v. Woodward*, 157 Mass. 516.

The contention of the Commonwealth that the burden is upon the defendant to show he was injured by action of the grand jury is unsound, because in the nature of things it would be impossible to prove the fact, if true, before the jury trial and because the wrong complained of is the violation of a substantial right guaranteed by the Declaration of Rights, and is not a mere failure of the grand jury to observe technical requirements and formalities. *Hartgraves v. State*, 5 Okla. Cr. Rep. 266. *Collier v. State*, 104 Miss. 602. *State v. Wetzel*, 75 W. Va. 7. *United States v. Heinze*, 177 Fed. Rep. 770. Our conclusion is supported by *State v. Bowman*, 90 Maine, 363; *Latham v. United States*, 141 C. C. A. 250; S. C. L. R. A. 1916 D 1118, and cases cited and collected in a note thereto; and is opposed by *State v. Brewster*, 70 Vt. 341; S. C. 42 L. R. A. 444, and cases collected.

We think it wise to continue to follow the well settled methods of procedure which were adopted at and have continued since the settlement of this Commonwealth. It follows that the trial judge should have found the plea in abatement sufficient.

*Exceptions sustained.*

## HARRY ALTMAN vs. JOSEPH ARONSON &amp; others.

Suffolk. October 29, 1918. — January 4, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Bailment*, Gratuitous. *Sale*, Return of goods. *Negligence*, Gross, Of bailee. *Evidence*, Presumptions and burden of proof.

A purchaser, who, upon examining goods shipped to him to fulfil a contract of sale by sample, discovers that the goods do not conform to the sample and reships them to the seller, in doing so is a gratuitous bailee of the goods.

A gratuitous bailee is liable to his bailor only for damages caused by bad faith or gross negligence for which he is responsible.

Statement by RUGG, C. J., of the rules in regard to negligence, gross negligence and wilful, wanton and reckless conduct.

Where the evidence at the trial of an action makes the rules distinguishing negligence from gross negligence applicable, a party requesting rulings as to such distinction has a right to have adequate instructions given to the jury on that subject.

At the trial of an action by a bailor against a gratuitous bailee for damages resulting from the fact that the defendant in shipping the bailed goods by express to the plaintiff stated to the express company as their value \$50 when the goods were worth over \$280, whereby, upon the goods being lost by the express company, the plaintiff was able to collect from it only \$50 instead of the value of the goods, the judge correctly instructed the jury that the defendant's duty was to act in good faith, and that the degree of care which he was bound to exercise was measured by the carefulness which he used toward his own property of a similar kind under like circumstances. Subject to exceptions by the defendant, he further instructed the jury that, "in determining the question that is presented here, it would be necessary to ask the question whether the defendant, in dealing with the property of the plaintiff, did deal with it with the same degree of carefulness which any person would use toward his own property of similar kind, under like circumstances," and, continuing, stated as the standard for the jury's guidance, the conduct of an "ordinarily prudent man . . . under like circumstances." *Held*, that this rule last laid down would impose upon the defendant liability for simple negligence when he was liable only for bad faith or gross negligence, and was erroneous.

At the trial above described, the only evidence of the standard of care exercised by the defendant toward his own goods of similar character was from one of his own employees and tended to show the same degree of care as that shown as to the bailed goods. *Held*, that, since the jury might disbelieve this testimony, they, having no other evidence on the subject, might be unable to find bad faith on the part of the defendant and would need some guide as to what rule they should follow; and that the judge's instruction, giving the rule as to ordinary negligence, which then would be their only guide, therefore was prejudicial to the defendant.

It *also was said* that on the evidence set out above, with the testimony of the defendant's employee disbelieved, a finding was warranted that the defendant was grossly negligent in reshipping the silk to the plaintiff with a valuation of not more than \$50, when its value was more than \$280.

TORT for damages resulting from alleged negligence of the defendants in their method of reshipping to the plaintiff certain silk which the plaintiff had sold to the defendants but the defendants had refused to accept because it did not fulfil the requirements of their order. Writ dated June 25, 1917.

In the Superior Court the action was tried before *Hitchcock, J.* The plaintiff's evidence tended to show that the goods were worth \$283.24. Other material evidence is described in the opinion. At the close of the evidence the defendants moved that a verdict in their favor be ordered, and, that motion being denied, asked for and the judge refused to make the following rulings among others:

"8. The deposit of the merchandise with the defendants by the plaintiff was for the sole benefit of the plaintiff and the defendants owed no greater duty to the plaintiff in reference thereto than a gratuitous bailee owes to his bailor.

"9. The duty, if any, which the defendants owed to the plaintiff in reference to the merchandise was even less than that which a gratuitous bailee owes to his bailor, because the merchandise came into the defendants' hands against their will through the wrongdoing of the plaintiff.

"10. A gratuitous depositary or bailee is liable only for bad faith or gross negligence in reference to the thing bailed.

"11. Gross negligence means a materially greater want of care than in case of ordinary negligence.

"12. Gross negligence is something less than the wilful, wanton and reckless conduct which makes a defendant liable to a trespasser.

"13. There is not sufficient evidence to warrant a finding that the defendants acted with such want of care in relation to the merchandise as to make them liable to the plaintiff in this action.

"14. There is not sufficient evidence to warrant a finding that the defendants acted in bad faith or with gross negligence."

The jury found for the plaintiff in the sum of \$271.97; and the defendants alleged exceptions.

The case was submitted on briefs.

*S. Sigilman*, for the defendants.

*P. W. Jacobs & J. B. Jacobs*, for the plaintiff.

RUGG, C. J. The defendants bought by sample seven pieces of silk of the plaintiff. Certain silk from the plaintiff was delivered to the defendants by express, which on examination was found not to correspond to the sample. The defendants immediately reshipped the silk to the plaintiff. It was lost by the express company and never was delivered to the plaintiff. There was evidence that the defendants or one of their employees stated to the express company at the time of the return shipment that the value of the goods was under \$50. In truth their value was much greater. This action in tort is brought to recover the value of the silk (less \$50 collected of the express company), on the ground of negligence.

There is no controversy that the defendants in reshipping the silk were gratuitous bailees. The point to be decided is the measure of their liability as such.

It was said by Chief Justice Parker in the leading case of *Foster v. Essex Bank*, 17 Mass. 479, 498, 499, 507: "It will not be disputed, that, if it amounts only to a naked bailment, without reward, and without any special undertaking, which, in the civil and common law, is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith; as every one, who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of it. The degree of care, which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight, as to amount even to carelessness in another; yet the depositor has no reason to expect a change of character, in favor of his particular interest; and it is his own folly to trust one, who is not able, or willing, to superintend with diligence his own concerns. . . . The rule to be applied to this species of bailment is . . . that the depositary is answerable, in case of loss, for gross negligence only, or fraud which will make a bailee of any character answerable." This statement of the law, although made in 1821, constantly through the intervening years has been recognized

as comprehensive and sound, both in this Commonwealth and, with some exceptions, generally. As applied to a case of gratuitous bailment, it is adequate. It has recently been reiterated. *Rubin v. Huhn*, 229 Mass. 126.

The distinction between gross negligence and ordinary negligence also from that early date has been recognized and established. All the pertinent decisions are reviewed at length in *Massaletti v. Fitzroy*, 228 Mass. 487. Expressions of dislike of the term "gross negligence," or of inability to understand or formulate the distinction between gross and ordinary negligence, which at various times and in divers jurisdictions have found their way into judicial opinions, are no longer relevant to discussions of that branch of the law as it prevails in this Commonwealth. The difficulty in stating that distinction in cases, where the evidence requires it, must be met and overcome so far as possible. Indeed, simple negligence has sometimes been said not to be susceptible of easy definition. See *Gaynor v. Old Colony & Newport Railway*, 100 Mass. 208, 214. But legal obligations must be marked out and explained for the guidance of jurors, the enlightenment of the parties, and the information of the public.

Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances. It is a want of diligence commensurate with the requirement of the duty at the moment imposed by the law.

Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The ele-



ment of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.

This definition does not possess the exactness of a mathematical demonstration. But it is what the law now affords. It is the result of our own decisions. *Massaletti v. Fitzroy*, 228 Mass. 487, and cases cited at 500, 501. *Devine v. New York, New Haven, & Hartford Railroad*, 205 Mass. 416, 419. *Banks v. Braman*, 188 Mass. 367, 369. *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 271. It is supported by the great weight of authority in other jurisdictions.\*

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\* *Weld v. Postal-Telegraph Cable Co.* 210 N. Y. 59, 71, 72. *Neal v. Gillett*, 23 Conn. 437, 443. *Gray v. Merriam*, 148 Ill. 179. *Dallas City Railroad v. Beeman*, 74 Texas, 291. *Farmers' Mercantile Co. v. Northern Pacific Railway*, 27 No. Dak. 302. *Whitney v. First National Bank of Brattleboro*, 55 Vt. 154. *Lothian v. Western Union Telegraph Co.* 25 So. Dak. 319, 323. *Coit v. Western Union Telegraph Co.* 130 Cal. 657, 664. *Bennett v. New York, New Haven, & Hartford Railroad*, 57 Conn. 422, 426. *Doorman v. Jenkins*, 2 Ad. & El. 256. *Kingston v. Drennan*, 27 Canada Sup. Ct. 46, 60. *Donaldson v. Acadia Sugar Refining Co. Ltd.* 48 Nova Scotia, 451, 458. *Union Pacific Railway v. Henry*, 36 Kans. 565, 569, 570. *Jones v. Atchison, Topeka & Santa Fe Railway*, 98 Kans. 133, 137. *Chicago, Burlington & Quincy Railroad v. Johnson*, 103 Ill. 512, 525. *Jacksonville Southeastern Railway v. Southworth*, 135 Ill. 250, 255. *Memphis & Little Rock Railroad v. Sanders*, 43 Ark. 225, 229. *Campbell v. Monmouth Mutual Fire Ins. Co.* 59 Maine, 430, 437. *Wexel v. Grand Rapids & Indiana Railway*, 190 Mich. 469, 477. *Holverson v. St. Louis & Suburban Railway*, 157 Mo. 216, 240, 241. *Bannon v. Baltimore & Ohio Railroad*, 24 Md. 108, 124. *Poling v. Ohio River Railroad*, 38 W. Va. 645, 661. *Strong v. Western Union Telegraph Co.* 18 Idaho, 389, 406. *Walther*

The definition here given does not differ in any essential particular from the statement of the rule made by some courts to the effect that gross negligence is the omission of even such diligence as habitually inattentive and careless men do not fail to exercise in avoiding danger to their own person or property. *Dudley v. Camden & Philadelphia Ferry Co.* 13 Vroom, 25, 28. *Louisville & Nashville Railroad v. McCoy*, 81 Ky. 403, 413. *Louisville & Nashville Railroad v. Smith*, 135 Ky. 462. *White, Washer & King v. Western Union Telegraph Co.* 5 McCrary, 103, 113. *Wiser v. Chesley*, 53 Mo. 547. *McNabb v. Lockhart & Thomas*, 18 Ga. 495, 507.

But the definition here formulated is fundamentally at variance with that given in some other jurisdictions, which hold that gross negligence implies wilful conduct, either actual or constructive, intended to cause injury, a variance recognized in some of those decisions. *Jorgenson v. Chicago & Northwestern Railway*, 153 Wis. 108, 116. *Louisville & Nashville Railroad v. Orr*, 121 Ala. 489, 499. See *Bouchard v. Dirigo Mutual Fire Ins. Co.* 114 Maine, 361, 365. The reasons why this court cannot adopt the view of those decisions are set forth at length in *Banks v. Braman*, 188 Mass. 367, and need not be repeated here. Moreover, those decisions appear to ignore the contradiction implied in the use of "wilful negligence." See, in this connection, *Chicago, Rock Island & Pacific Railway v. Hamler*, 215 Ill. 525, 540; *Terre Haute & Indianapolis Railway v. Graham*, 95 Ind. 286, 293; *Thayer v. Denver & Rio Grande Railroad*, 21 N. M. 330, 346; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489.

Since the distinction between negligence and gross negligence is imbedded in our law and its principles for the discernment of that distinction are established, a party, whenever the evidence makes them applicable, has a right to insist that the jury be instructed in conformity to them.

In the case at bar the judge instructed the jury respecting the liability of the defendants as gratuitous bailees by saying at first: "'The duty which the law imposes on gratuitous bailees is that the bailee shall act in good faith.' That is, shall use the degree of care in the performance of the undertaking which is

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v. *Southern Pacific Co.* 159 Cal. 769. *Lee v. Northwestern Railroad*, 89 S. C. 274. *Colyar v. Taylor*, 1 Coldw. 372.

measured by the carefulness which the depositary uses toward his own property of similar kind, under like circumstances." That was correct. But the charge did not stop there. The judge then said further: "So that, in determining the question that is presented here, it would be necessary to ask the question whether the defendants, in dealing with the property of the plaintiff, did deal with it with the same degree of carefulness which any person would use toward his own property of similar kind, under like circumstances. . . . Now, if the ordinarily prudent man, in shipping goods, in dealing with his own property, would have shipped them by an express company, and would have shipped them upon an express receipt in which the value was limited to not more than a certain sum, if that would be what an ordinarily prudent man would have done under like circumstances and in a similar situation; if that is what these defendants did, of course, they are not liable. If, on the other hand, they did not deal with it as the ordinarily prudent man, dealing with his own property under like circumstances, would have done, and if they were careless in not doing so, then the plaintiff would be entitled to a verdict in this case." That was erroneous. It imposed upon the defendants liability for simple negligence. As has been pointed out, they were not liable for ordinary negligence, but only for gross negligence or bad faith.

It would have been correct to state the law as laid down in *Foster v. Essex Bank*, *ubi supra*, or in *Rubin v. Huhn*, *ubi supra*, and instruct the jury that bad faith or gross negligence in dealing with the goods held by them was the standard of the defendants' liability, and that failure to use with respect to the plaintiff's goods the same care which they exercised toward their own was sufficient to establish bad faith and hence liability. But the only evidence as to the way in which the defendants dealt with their own goods of similar character under like circumstances came from an employee of the defendants. The jury might not believe his testimony. If they reached that conclusion, then they would have no standard of bad faith as established by the conduct of the defendants with respect to their own goods under like circumstances, and would need some guide as to the law which they ought to follow. The judge gave them the rule of ordinary negligence. He ought to have stated to

them the other standard of the defendants' liability, that is to say, the liability arising from gross negligence with respect to the property of the plaintiff as defined heretofore in this opinion. This, although requested, he failed to do.

The judge rightly refused to direct a verdict in favor of the defendants. The facts were sufficient to support a finding for the plaintiff. It was for the jury to say whether it was not gross negligence or want of good faith on the part of the defendants to fail to observe the quantity of silk and to reship it to the plaintiff with an excessive undervaluation given to the carrier, a statement as to value by which the parties became bound by contract. *Aradalou v. New York, New Haven, & Hartford Railroad*, 225 Mass. 235, and cases cited at page 238.

The jury may have discredited the evidence tending to show that they exercised the same care with respect to the goods of the plaintiff as they did with respect to their own. If they did so discredit it, then they might find gross negligence on the other evidence.

*Exceptions sustained.*

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EDWARD S. UNDERWOOD, trustee in bankruptcy, vs.  
LOUIS M. WINSLOW & another.

Essex. November 13, 1918. — January 6, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Bankruptcy, Preference. Equity Pleading and Practice, Appeal.*

At the hearing of a suit in equity by a trustee in bankruptcy against a bank and its vice president, seeking a conveyance to the plaintiff of certain real estate conveyed by the bankrupt within four months of his adjudication to the defendant vice president for the bank's benefit, the plaintiff alleging that at the time of the conveyance the bankrupt was insolvent, that the bank and the vice president had reason to believe that he was so and that the conveyance was intended to and did enable the bank to obtain a greater percentage of its debt than did other creditors of the bankrupt of the same class, there was evidence tending to show that for eleven years previous to 1914 the bankrupt borrowed from the bank and each year paid his indebtedness; that at the beginning of 1914 he owed the bank \$2,700 and at the end \$9,000, the only payment he made during that year being \$1,000 in April; that from April, 1914, to February, 1915, there were thirty renewals of his notes at the bank and that

his credit balance there was small. There also was evidence showing that the officers thought that the bankrupt was deceiving them and knew that he owed another bank \$8,000; that at the time of the conveyance the bankrupt was insolvent, that the vice president did not know of the conveyance until informed later by the president, and that the debts owed other creditors amounted to about \$35,000. There also was evidence tending to show it was agreed that when the bank's loans were paid the property was to be returned to the bankrupt. The judge made findings for the plaintiff and a final decree was entered accordingly, from which the defendants appealed. *Held*, that the findings were warranted by the evidence.

**BILL IN EQUITY**, filed in the Superior Court on April 25, 1916, by the trustee in bankruptcy of Joseph F. Day against Louis M. Winslow and the Lynn National Bank, alleging that the bankrupt, when insolvent and when the defendants had reasonable cause to know that he was so, conveyed certain real estate to the defendant Winslow, an officer of and acting for the defendant bank, which operated as a preference of the defendant bank over Day's other creditors. The prayer of the bill was for a conveyance of the real estate to the plaintiff and for an accounting.

The suit was heard by *Thayer, J.* The material evidence is described in the opinion. The judge found for the plaintiff and by his order a final decree was entered accordingly. The defendants appealed.

*R. L. Sisk, (W. O'Shea with him,)* for the defendants.

*H. R. Mayo*, for the plaintiff.

**CARROLL, J.** This is a bill in equity brought by the trustee in bankruptcy of Joseph F. Day of Lynn to set aside a conveyance of real estate, dated May 26, 1915, made in fraud of the bankruptcy act to the defendant Louis M. Winslow. It is agreed that Winslow held the title for the benefit of the Lynn National Bank, a creditor of the bankrupt.

The case was heard before a judge without a jury, who found that Day was insolvent on the date of the transfer, and that both Winslow and the bank had at this time reasonable cause to believe he was insolvent; that the conveyance was intended to give a preference to the bank and would enable it to obtain a greater percentage of its debt than other creditors of the same class. The defendants contend that the finding cannot stand; that there was no evidence to show they had reasonable cause to believe that Day was insolvent.

Although reasonable cause to believe is different in meaning

from reasonable cause to suspect, *Putnam v. United States Trust Co.* 223 Mass. 199, 205, the trustee was not required to show absolute knowledge by the defendants that the transaction would effect a preference. All that he was required to show was that the defendants had reasonable cause to believe this. *Jacobs v. Saperstein*, 225 Mass. 300. Applying this principle, there was sufficient evidence to warrant the findings of the presiding judge. The bankrupt borrowed money from the defendant bank from 1903 to 1914 and each year paid his indebtedness. January 1, 1914, he owed the bank \$2,700, and in the following December, \$9,000; during that year, the only payment was \$1,000 made in April; from April, 1914, to February, 1915, there were thirty renewals of notes and his credit balance was small. While the president of the defendant bank testified he relied on the statement of Day that he owed only \$283.94 for merchandise and nothing for borrowed money except to the defendant bank, he admitted that Day had made many false statements to him about his indebtedness, and told him "many cock-and-bull stories." There was evidence that the defendant Winslow, who was vice president of the bank, in April, 1915, knew that Day was indebted to another bank in the sum of \$8,000, and expressed his loss of confidence in him. The cashier of the bank knew that the bankrupt was having great difficulty in securing funds to pay his debts. In April, 1915, when a payment of \$1,500 was made, he was informed by the president that the bankrupt received this money from his mother's savings bank account. The cashier called the attention of the president to the fact that Day was not following his custom of paying his account at the end of the year, and the president then began urging Day to make a payment. It was admitted that while the conveyance was made to Winslow, he had no knowledge of it until informed by the president. The grantor, Day, owed the defendant bank \$7,500 and his debts to other creditors were about \$35,000. At the time of the real estate transfer a bill of sale of personal property was executed by Day to the bank, and Harwood, the president, testified that when Day "got his money from Mrs. Coolidge, . . . I was to turn this property back to him, . . . lacking the interest for the time it ran."

Without relating all the evidence, it was ample to justify the finding that men of ordinary business ability, under all the cir-

cumstances disclosed, would have reasonable cause to believe that the conveyance of the real estate was made when Day was insolvent, and was a preference. In addition to this, the judge who heard the cause saw the witnesses and had the opportunity to observe their appearance and manner of testifying. His findings are not to be set aside unless clearly wrong.

*Decree affirmed with costs.*

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COMMONWEALTH vs. HARRY L. RUNGE.

SAME vs. SAME.

Suffolk. November 14, 1918. — January 6, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

*Physicians and Surgeons. Practice, Criminal, Continuing offence, Judge's charge: curing error. Evidence, Relevancy.*

Where a complaint under R. L. c. 76, § 8, charges the defendant with unlawfully holding himself out as a practitioner of medicine between two dates named, the complaint is for a continuing offence and the time during which the defendant is charged with having committed a series of acts is a material part of the offence described, and accordingly evidence of acts committed by the defendant before the time specified must be excluded.

The provisions of R. L. c. 218, § 20, in regard to allegations of the time of the commission of a crime are not made applicable to continuing offences where time "is an essential element of the crime."

At the trial on a complaint under R. L. c. 76, § 8, for practising medicine without being lawfully authorized to do so and without being registered as required by law, the judge in his charge made certain remarks in regard to the leniency that the court endeavored to exercise in imposing sentences in such cases, but the judge immediately added the following instructions: "But in regard to the disposition of the case, leave that all aside. That is not something concerning which you have to worry or bear the responsibility; that is upon the court. What you have to decide here is the truth. If, upon the law and the evidence in this case, there should be a verdict of guilty, say so; and if there should be a verdict of not guilty, then say that too; but come into court — whether it be a verdict for the government or for the defendant — with a verdict which in your consciences you believe to be a true verdict, a verdict the rendering of which you and all concerned with the case can feel satisfaction with, a verdict after the rendering of which you can look your fellows in the eye, and say, 'According to my conscience, this verdict is a true verdict.'" *Held*, that, if the defendant had had any right to complain of the earlier part of the judge's charge referred to above, his ground of complaint had been removed by the further instructions of the judge that immediately followed.

TWO COMPLAINTS under R. L. c. 76, § 8, received and sworn to in the Municipal Court of the City of Boston on February 18 and August 3, 1915, the first charging the defendant with practising medicine on November 18, 1914, and on divers other days between that date and February 18, 1915, not being authorized to do so and not being registered with the board of registration in medicine of the Commonwealth according to law, and the second charging the defendant with holding himself out as a practitioner of medicine between March 3, 1915, and August 3, 1915, without being lawfully authorized to practise medicine within the Commonwealth and without being registered as required by law.

In the Superior Court the defendant was tried on both complaints before *Dana, J.* The material evidence is described in the opinion. The defendant made a motion upon each of the complaints that the judge should instruct the jury upon all the evidence to return a verdict of not guilty. The judge denied both of these motions, and he also refused to make certain rulings requested by the defendant. The material portion of the judge's charge is described and quoted in the opinion.

"The defendant excepted to that portion of the judge's charge upon the second complaint which instructed the jury to consider and apply evidence outside of the dates alleged in that complaint for the purpose stated by the" judge. He also "excepted to that portion of the judge's charge which referred to the manner of disposing of a case."

The jury returned a verdict of guilty on each of the complaints; and the defendant alleged exceptions.

The appeal referred to in the opinion was taken in each case by the defendant from an order of the judge denying a motion to quash the complaint.

*J. F. Barry*, for the defendant.

*A. C. Webber*, Assistant District Attorney, for the Commonwealth.

LORING, J. In this case there were two complaints. The second complaint charged the defendant with having unlawfully held himself out "as a practitioner of medicine" (in violation of R. L. c. 76, § 8), between March 3, 1915, and August 3, 1915. At the trial the government did not put in evidence any such act between the dates named. But it did introduce evidence of



one such act on February 21, 1914, and of another on February 12, 1915. The presiding judge instructed the jury that, if the defendant held himself out as a practitioner of medicine upon any occasion preceding the date alleged in the complaint and within a period of six years next before that date they could find the defendant guilty. To this ruling the defendant took the exceptions which are now before us.

The offence created by R. L. c. 76, § 8, may be committed by a single act or by a series of continuous acts. That is to say, it may consist of a single offence or of a continuing offence. In the case at bar the government elected to charge the defendant with a series of acts committed between March 3, 1915, and August 3, 1915, which constituted the continuing offence of illegally holding himself out as a practitioner of medicine. When a defendant is charged with a series of acts as a continuing offence, the offence charged is a single indivisible offence and a part of the description of the offence charged is the duration of time during which it is charged in the indictment the series of acts took place. That was decided in *Commonwealth v. Robinson*, 126 Mass. 259. In that case the defendant was complained of for keeping a liquor nuisance between January 1 and August 20. He pleaded in bar that he had been acquitted on a complaint charging him with having kept the same illegal liquor nuisance from January 1 to May 28. It was held that the acquittal was a bar. The decision was made on the ground that a continuing offence for a period named is one indivisible offence, and since the defendant in the case then before the court had theretofore been acquitted of the offence for a portion of the time in question on the later charge he had been acquitted of the offence later charged. It follows from this that the duration of time specified in case of a continuing offence is a part of the description of the offence charged. It is for this reason that evidence of acts committed outside the time specified are not admissible in evidence. *Commonwealth v. Briggs*, 11 Met. 573. *Commonwealth v. Purdy*, 146 Mass. 138. *Commonwealth v. Fuller*, 163 Mass. 499, 500.

The learned district attorney has argued that this has been changed by § 10 of the act for the simplification of criminal pleading (St. 1899, c. 409), now R. L. c. 218, § 20. But that section does not apply where "it [time] is an essential element of the

crime." He has argued also that *Commonwealth v. Peretz*, 212 Mass. 253, is authority for his contention that the rule as to continuing offences was changed by the act for the simplification of criminal pleading. But the decision in *Commonwealth v. Peretz*, was not founded upon § 10 of the original act, now R. L. c. 218, § 2Q, but upon § 5 of the original act, now R. L. c. 218, § 34. What was decided in *Commonwealth v. Peretz* was that an indictment charging a defendant with a continuing offence during a time, part of which was before the acts charged constituted an offence, must be construed (at least under R. L. c. 218, § 34) to be a charge that the acts charged began from the time when the statute making them an offence went into effect. The doctrine of *Commonwealth v. Robinson*, *ubi supra*, was stated at length in that case at pages 254, 255. The exception to the charge must be sustained and a new trial had on the second complaint.

The only exception argued which has to do with the first complaint is that taken to the following part of the judge's charge to the jury. In his charge to the jury the presiding judge said: "The penalty attaching in a case of this kind is ordinarily not heavy, in one sense of the word. Of course, a person would be reluctant to have a criminal record such as this weigh against him; but those matters should be wholly disregarded. As I have told you before, in imposing sentence, there is a wide discretion left to the court; and the court endeavors, so far as it is able, with justice to the defendant, and with regard to the public weal, to impose a sentence that under all the circumstances of the case is merciful and fair to the government and to the defendant. There are many ways in which a case, even after a verdict, may be disposed of by the court — probation; putting a case on file; putting it on file upon payment of expenses; and also, where that seems to be required, imprisonment, — in this case, for a short period." To this the defendant took an exception. The judge, however, immediately added: "But in regard to the disposition of the case, leave that all aside. That is not something concerning which you have to worry or bear the responsibility; that is upon the court. What you have to decide here is the truth. If, upon the law and the evidence in this case, there should be a verdict of guilty, say so; and if there should be a verdict of not guilty, then say that too; but come into court — whether it be a verdict for the government

or for the defendant — with a verdict, which in your consciences you believe to be a true verdict, a verdict the rendering of which you and all concerned with the case can feel satisfaction with, a verdict after the rendering of which you can look your fellows in the eye, and say, 'According to my conscience, this verdict is a true verdict.'" If the defendant had a right to complain of the part of the charge to which he took an exception his ground of complaint was taken away by what was said by the judge immediately afterwards.

The result is that the exceptions must be overruled so far as the first and sustained so far as the second complaint is concerned.

The appeal taken has not been argued. We treat it as waived. An entry to that effect may be made. Under these circumstances it is not necessary to consider whether the appeal is properly before us.

*Ordered accordingly.*

## SUPPLEMENT.

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### OPINION OF THE JUSTICES TO THE SENATE.

Spec. St. 1918, c. 159, providing in substance for the leasing to the Commonwealth of the road and property of the Boston Elevated Railway Company to be operated for a limited time by public officers upon the payment of a fair rent, is constitutional.

A statute changing Spec. St. 1918, c. 159, by providing for a maximum fare of five cents upon the lines of the Boston Elevated Railway Company, and by providing that, if the income thus received shall be inadequate to meet the cost of service, the deficiency shall be made up by payments from the treasury of the Commonwealth out of moneys to be borrowed, and that the sums so advanced shall be assessed upon the cities and towns using the service of the company, would be constitutional.

A statute changing Spec. St. 1918, c. 159, by providing for reducing the fares to be charged on the lines of the Boston Elevated Railway Company by the payment by the Commonwealth to that company of an amount equal to the rentals due from the company for the use of subways and for the ultimate assessment of the sums so paid by the Commonwealth upon the cities and towns using the service of the company, would be constitutional.

The General Court has the right to authorize the operation of the lines of the Boston Elevated Railway Company by the Commonwealth through trustees appointed by the Governor, because the transportation of the public thus provided for is a public purpose; and there is no constitutional requirement that the operation of the lines for such a purpose by the public authorities shall be at cost or at a profit.

A statute of the character described would be constitutional only after a legislative determination that the value of the private property thus devoted to a public use required such contribution from the Commonwealth in addition to all other sources of income in order that the owners of the property might receive a fair return. Such a legislative determination was made by Spec. St. 1918, c. 159, §§ 5, 6, in fixing the "dividends" to be paid upon the shares of the Boston Elevated Railway Company.

In making legislative provision for the apportionment of public burdens among different municipalities, although it has been the custom of the General Court usually to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, this has not always been done and it is not necessary under the Constitution.

THE following order was passed by the Senate on March 12, 1919, and on March 15, 1919, was transmitted to the Justices of the

Supreme Judicial Court. On April 2, 1919, the Justices returned the answer which is subjoined.

WHEREAS, there is now pending in the General Court a bill numbered Senate 54, entitled "An Act establishing a five cent fare on the lines of the Boston Elevated Railway Company and subsidizing the company from the public treasury for any resulting deficiency," a copy of which is herewith submitted; and

WHEREAS, said bill makes reference to chapter 159 of the Special Acts of the year 1918, and proceeds upon the assumption that said chapter 159 is constitutional and wholly operative, the stockholders of the Boston Elevated Railway Company and the West End Street Railway Company having duly accepted the provisions of said chapter 159, and all the conditions prescribed therein having been performed, which under its terms are necessary in order to render it fully effective; and

WHEREAS, there is also now pending in the General Court a bill numbered House 722, entitled "An Act to provide for the assumption of subway rentals by the communities served by the Boston Elevated Railway Company," a copy of which is herewith submitted, and which also refers to said chapter 159, and likewise proceeds upon the assumption that said chapter 159 is constitutional and wholly operative; and

WHEREAS, there are other bills pending before the General Court, — to wit: — Senate bills numbered 52 and 287, and House bills numbered 721, 1351 and 1352, — copies of which are hereto annexed, which cannot be intelligently acted upon unless the General Court is authoritatively advised relative to the constitutionality of said chapter 159; therefore be it

ORDERED, That the Senate require the opinions of the Honorable the Justices of the Supreme Judicial Court upon the following important questions of law:

- (1) Would said Senate Bill No. 54 be constitutional if enacted?
- (2) Would said House Bill No. 722 be constitutional if enacted?
- (3) Is the whole or any part of said chapter 159 unconstitutional?
- (4) Is any part, or are any parts, of said chapter 159 which have a direct relation to the validity of said Senate Bill No. 54 or said House Bill No. 722, unconstitutional?

Senate Bill No. 54, referred to above, was as follows:

An Act establishing a Five Cent Fare on the lines of the Boston Elevated Railway Company and subsidizing the Company from the Public Treasury for any Resulting Deficiency.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The rate of fare for each single passage over the lines of the Boston Elevated Railway Company that may be fixed by the board of trustees of said company, acting under chapter one hundred and fifty-nine of the Special Acts of nineteen hundred and eighteen, shall not exceed the sum of five cents, and the distance that may be travelled for the sum of five cents shall in no case be less than as established on the day nine-  
teen hundred and eighteen.

SECTION 2. If the rate of fare chargeable under the provisions of section one is inadequate to meet the cost of the service, less all the items to be deducted as provided in section six of said chapter one hundred and fifty-nine, including dividends as therein specified, the reserve fund established under section five of said chapter one hundred and fifty-nine, shall be used to make up the deficiency as provided in section nine of said chapter one hundred and fifty-nine.

SECTION 3. If at any time said reserved fund be less than seventy per cent of its amount as originally established, the trustees shall thereupon give notice to the Treasurer and Receiver General, and the Commonwealth shall thereupon pay over to the company such amount as may be necessary to restore said fund to an amount equal to said seventy per cent. In order to meet any payment required under this section, the Treasurer and Receiver General may borrow at any time, in anticipation of the assessments to be levied upon the cities and towns, as provided in the following section, such sums of money as may be necessary to make said payment.

SECTION 4. All sums advanced to the company under the provisions of the preceding section shall be assessed upon the cities and towns in which the company operates in the manner provided by section fourteen of said chapter one hundred and fifty-nine.

SECTION 5. So much of said chapter one hundred and fifty-nine as is inconsistent herewith is hereby repealed.

SECTION 6. This act shall not take effect unless it is accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company, not including the preferred stock issued under section five of said chapter one hundred and fifty-nine, and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing with the secretary of a certificate to that effect signed by a majority of the directors of the Boston Elevated Railway Company.

House Bill No. 722, referred to above, was as follows:

An Act to provide for the Assumption of Subway Rentals by the Communities served by the Boston Elevated Railway Company.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

In order to decrease the rates of fares which would otherwise be necessary to meet the cost of service upon the Boston Elevated Railway, the board of trustees of the Boston Elevated Railway Company are hereby directed quarterly on the first of January, April, July and October to certify to the Treasurer and Receiver General the amount paid during the preceding quarter for rentals of subways or other property owned by the Commonwealth, or any city, town, or other subdivision thereof and leased to said company, and the Commonwealth shall thereupon pay over to the company the amount so certified. In order to meet said payments the Treasurer and Receiver General shall borrow any sums necessary therefor, and thereafter repay the same, and any sums so paid to the company together with interest or other charges incurred in borrowing money therefor shall be assessed upon the cities and towns in which the company is operated, in the manner provided by chapter one hundred and fifty-nine of the Special Acts of the year nineteen hundred and eighteen with reference to deficiencies in the reserve fund thereby established.

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the questions upon which our opinion is required by the order

of March 12, 1919, a copy of which is hereto annexed, and respectfully submit this opinion:

The questions relate primarily to the constitutionality, if enacted, of Senate Bill No. 54 and House Bill No. 722. These bills in form and substance are amendments to Spec. St. 1918, c. 159. Nevertheless the proposed changes are so radical as to make them in substance important new legislation and not mere perfecting of the details of an existing statute. In order to express an intelligent opinion upon the proposed bills, it is necessary to examine the original statute. We are constrained to do this under these circumstances notwithstanding the well settled rule, from which we do not here depart, that we are not required to express to the General Court or either branch thereof opinions as to the constitutionality or construction of statutes already enacted. *Commonwealth v. Smith*, 9 Mass. 531. *Opinion of the Justices*, 226 Mass. 607, and references at page 612.

We consider first Spec. St. 1918, c. 159. That act was in substance and effect a taking over of the Boston Elevated Railway by the Commonwealth for operation for a limited period of ten years and possibly for a longer period under some circumstances, upon condition that its terms should be accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company and of the West End Street Railway Company and upon the further condition that the Boston Elevated Railway Company should provide for raising \$3,000,000 by the issuance of that amount of new and preferred stock. Two main purposes of that act were (1) to provide for the establishment of rates of fares which should be adequate to pay the cost of performing the service furnished by the Commonwealth through using the property of the Boston Elevated Railway Company as that cost was defined in § 6, and (2) to make an agreement for the payment of the rental for the use of the Boston Elevated Railway Company and its property by the Commonwealth by agreement with the companies interested to be manifested by acceptance by their stockholders. That rental was fixed by §§ 5 and 6 at payment not exceeding seven per cent on the preferred stock and by payment of dividends on the common stock of five per cent for the first two years, five and one half per cent for the succeeding two years, and six per cent for the remainder of the period of public operation. The chief



design of that act was to provide by public operation for fares at rates sufficient to meet all costs of furnishing the service.

In § 11 provision was made for the advancement of moneys by the Commonwealth (to be assessed upon the cities and towns enjoying the service) to maintain the reserve fund. But that was rather an incidental provision to tide over the affairs of the company until the fundamental idea of rates adequate to meet the cost of the service could be established and the habits of the travelling public could become adjusted thereto. That act was accepted by the stockholders of the two corporations and the new stock has been subscribed. Thus the act has become operative according to its terms and constitutes a contract between the parties as set forth in § 18.

We are of opinion that that act was constitutional and for these reasons: The means of transportation for people at large is a matter of public interest. In earlier times turnpikes and toll bridges in private ownership and management afforded facilities for travel. Gradually these mostly have been taken over by counties, cities and towns and the tolls abolished. *Andover & Medford Turnpike Corp. v. County Commissioners*, 18 Pick. 486. *Murray v. County Commissioners*, 12 Met. 455. *Central Bridge Corp. v. Lowell*, 4 Gray, 474; S. C. 15 Gray, 106. The ownership and operation of a ferry by a municipality contravenes no constitutional limitation. *Attorney General v. Boston*, 123 Mass. 460. Steam railroads in their last analysis are highways for the use of the public. The Commonwealth has in several instances lent its aid to the construction of such railroads. See *Kingman, petitioner*, 153 Mass. 566, 570, for references to statutes. Numerous special statutes and finally a general law have been enacted authorizing cities and towns to subscribe for stock of railroads. *Kittredge v. North Brookfield*, 138 Mass. 286. *Commonwealth v. Williamstown*, 156 Mass. 70. Such legislation is constitutional. *Prince v. Crocker*, 166 Mass. 347, 361. The Commonwealth contributed toward the construction of the Hoosac Tunnel and ultimately acquired the ownership and assumed the management of the Troy and Greenfield Railroad. *Troy & Greenfield Railroad v. Commonwealth*, 127 Mass. 43. *Amstein v. Gardner*, 134 Mass. 4. Nearly forty early statutes incorporating street railways contained a section whereby the municipality within which such railway was

constructed might acquire its property. The construction of the Boston subway for street railway purposes was held a public use for which money raised by taxation lawfully might be expended. *Prince v. Crocker*, 166 Mass. 347. The same is true of the East Boston Tunnel. *Browne v. Turner*, 176 Mass. 9. Property invested in street railways by private investors has been held to become thereby affected with a public interest. *Donham v. Public Service Commission*, 232 Mass. 309. It has been decided in other jurisdictions that the construction, acquisition and operation of street railways may be made a municipal function. *Sun Printing & Publishing Association v. Mayor of New York*, 152 N. Y. 257. *Walker v. Cincinnati*, 21 Ohio St. 14. *Platt v. San Francisco*, 158 Cal. 74, 81, 82. *Barsaloux v. Chicago*, 245 Ill. 598. Under modern conditions local transportation by an electric railway may be determined by the Legislature to concern the welfare and convenience of all the inhabitants of a particular district. In essence Spec. St. 1918, c. 159, was a legislative agreement for the lease to the Commonwealth of a public utility to be operated for a limited time by public officers upon the payment of fair rental on an investment made under public supervision and under laws prohibiting stock watering or other means of inflation.

We are led to the conclusion that said c. 159 was within the constitutional power of the Legislature.

A radical change in the scheme embodied in Spec. St. 1918, c. 159, is proposed by Senate Bill No. 54 and House Bill No. 722. Rates of fare large enough to pay the cost of the service are abolished and a fare, which is or may be less than cost, is substituted, the balance of the cost to be made up by taxation. Senate Bill No. 54 provides in substance for a maximum fare of five cents upon the lines of the Boston Elevated Railway Company, and, if the income thus received shall be inadequate to meet the cost of the service, as apparently confessedly it will be, the deficiency is to be made up by payments to the Boston Elevated Railway Company from the treasury of the Commonwealth out of moneys to be borrowed. Sums so advanced are to be assessed upon the cities and towns in which the lines of the company are operated in proportion to the number of persons therein using the railway company. Thus the money paid to the Boston Elevated Railway Company is ultimately to be raised by taxation. In form and substance

Senate Bill No. 54 is an amendment of Spec. St. 1918, c. 159. The proposed bill amends that act in effect by striking out § 7, which requires fares as nearly as possible to meet the cost of service, and by substituting therefor its § 1, which establishes a maximum fare of five cents, and by modifying by its §§ 2, 3, 4 and 5, the terms of §§ 9, 10, 11 and 14 of said c. 159. House Bill No. 722 aims at the result of reducing the fares to be charged on lines of the Boston Elevated Railway Company by the payment by the Commonwealth to that company of an amount equal to the rentals due from it for the use of subways and the ultimate assessment of the sums so paid upon the same cities and towns in the same way as in Senate Bill No. 54. This also is a raising by taxation of money for the operation of the Boston Elevated Railway Company. Thus the conception of rates of fare adequate to meet the cost of the service is wholly eliminated and for that plan a fixed maximum rate of fare, which is or may be much less than the cost of service, is put in its place, the difference between the actual cost of the service and the fixed maximum rate to be made up out of moneys to be raised by taxation. The method adopted is to continue the payment of the dividends to the stockholders of the Boston Elevated Railway Company fixed by said c. 159 and treat these dividends as a part of the cost of the service. The proposed legislation provides also that it shall become operative with its burdens of increased taxation in the various cities and towns to be affected without submission to their voters or municipal boards or officers for acceptance.

It is a matter of common knowledge that the expenses of maintenance and operation of street railways in the neighborhood of Boston have increased enormously since the outbreak of the great war. This is due among other causes to the greatly augmented costs of labor, copper, coal and necessary supplies. The adjustment of fares to meet these changed conditions without unusual public inconvenience and interference with settled social conditions of a considerable portion of the people presents a problem of great difficulty. The present appears to be commonly regarded as a period of transition, where prophecy as to the ultimate adjustments to be reached is uncertain.

The fundamental question thus presented is whether the State has the power under the Constitution to take over a public utility

such as is the Boston Elevated Railway Company and operate it for so low a rate of fare as to create a deficit and pay that deficit in the only way in which it can be paid, out of moneys raised by taxation. To state the question differently, it is whether the State can carry such persons as desire to ride upon the Boston Elevated Railway at less than cost and assess the rest of that cost upon the public by taxation. This is an entirely novel question so far as we are aware. No decision has been made of such a question to our knowledge. Reference was made to the general principle in *Opinion of the Justices*, 150 Mass. 592, 593, in these words: "We also assume that the gas or electricity to be furnished to the inhabitants for their private use is to be paid for by them at rates to be established, which shall be deemed sufficient to reimburse to the cities and towns the reasonable cost of what is furnished, and that all the inhabitants of a city or town are to have the same or similar rights to be supplied with gas or electricity, so far as is reasonably practicable, and the capacity and extent of the works, which it is deemed expedient to maintain, will permit. Whether cities and towns can be authorized to give gas or electricity to their inhabitants, or to sell either to them, at varying and disproportionate prices, selecting their customers, selling to some and arbitrarily refusing to sell to others, are questions which it is not necessary to consider." It also was said in *Attorney General v. Boston*, 123 Mass. 460, at pages 469, 470, that it was not necessary to consider "whether it is within the power of the Legislature, under the Constitution of the Commonwealth, to authorize a city or town to establish and maintain a free ferry at the public expense." It was said in *Davies v. Boston*, 190 Mass. 194, 197, respecting the same ferry, "The fact that the business, as managed, was not profitable to the city does not change its character."

It is an underlying principle of our government that money raised by taxation can be used only for public purposes and not for the advantage of private individuals. "The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns

the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." *Lowell v. Boston*, 111 Mass. 454, 460, 461.

There are numerous instances where the State has authorized the construction and maintenance of public works which involve the element of benefit to private individuals. Assessments of benefits are authorized but seldom are required to equal in amount the benefit conferred. It is limited sometimes to one half only. See as to highways, R. L. c. 50, § 1, now St. 1917, c. 344, Part III, § 1. There is no such limitation as to the assessment of benefits arising from sewers. R. L. c. 49, § 3. Annual assessments for the use of sewers to aid in their maintenance have been authorized. Some statutes authorize assessments for reconstruction of sidewalks. All these statutes have been upheld. *Carson v. Brockton*, 175 Mass. 242, and 182 U. S. 398. *Sayles v. Public Works of Pittsfield*, 222 Mass. 93. Statutes authorizing building of a market-house, *Spaulding v. Lowell*, 23 Pick. 71, the removal of ashes, *Haley v. Boston*, 191 Mass. 291, and the maintenance of public baths, *Bolster v. Lawrence*, 225 Mass. 387, part of the expense to be charged to those benefited, have been upheld. In no instance, so far as we are aware, has it been intimated that the entire expense must be borne by those benefited or that the entire benefit must be assessed. The taking over of toll bridges and roads and the abolition of tolls have already been referred to.

The fundamental question is whether the General Court has the right to authorize the operation of the Boston Elevated Railway Company through trustees appointed by the Governor. It can do so if it is a public purpose. If it is a public purpose, the General Court has the same power respecting that purpose that it has respecting other public purposes. Since transportation of the public such as is furnished by the Boston Elevated Railway is a public purpose, there is no imperative constitutional requirement that it must be operated by the public authorities at cost or at a profit.

The present bills provide in their ultimate analysis for taxation in order that dividends may be paid to the stockholders of a public service corporation. Property invested by private persons in

public service corporations becomes affected with a public interest. Statutes authorizing rate regulation of privately owned public utilities rest on this principle. It commonly has been held that stockholders of such corporations who have wisely and honestly invested property actually used for the benefit of the public are entitled to a reasonable return upon their investment. We are unable to discern any distinction in principle between public operation at a loss to be made up by general taxation of a utility owned by the public and a contribution from public money toward the efficient maintenance of the same utility in private ownership but under public operation. A statute to such an end would be constitutional, however, only after a legislative determination that the real value of the private property so devoted to the public use, together with all its other sources of income, required such contribution in order that it might receive fair return. Legislation designed merely to provide a gratuity to private individuals, corporations or stockholders, would of course be unconstitutional. Such a determination was made in essence by the enactment of said c. 159. That act in §§ 5 and 6 substantially determined that the dividends there set forth constituted a fair return on actual investment.

Therefore, we are of opinion that the public as a body has a concern in the continued operation of the Boston Elevated Railway, by the trustees appointed by the Governor, in a safe and practical manner adequate to the needs of those who travel. If the rational way to accomplish this result is an assumption by the public of a part of the expense so that the burden of operation shall not fall alone upon the shareholders but also in part upon the cities and towns using the service in the way provided in the proposed bills, that is a public purpose. It was an inducement to stockholders to continue an otherwise losing and possibly confiscatory investment.

The right to apportion the public burdens among different, separate divisions of the State can hardly be questioned. *Hingham & Quincy Bridge & Turnpike Corp. v. County of Norfolk*, 6 Allen, 353. Although it has been the custom of the General Court to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, that has not always been done nor is it necessary under the Con-

stitution. The power of the Legislature is paramount in this particular. *Kingman, petitioner*, 153 Mass. 566.

The questions presented reach into a new field differing fundamentally from any hitherto occupied by legislation. We have given them the best consideration possible in the time at our disposal.

Therefore we answer "Yes" to questions (1) and (2) and "No" to questions (3) and (4).

ARTHUR P. RUGG.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

CHARLES A. DE COURCY.

JOHN C. CROSBY.

EDWARD P. PIERCE.

JAMES B. CARROLL.

**THE HONORABLE MARCUS PERRIN KNOWLTON**, an Associate Justice of this court from September 14, 1887, until December 17, 1902, and the Chief Justice of this court from December 17, 1902, until September 7, 1911, died at Springfield on May 7, 1918. On March 22, 1919, a special sitting of the full court was held, with all of the Justices present, at which there were the following proceedings:

The Attorney General addressed the court as follows:

May it please your Honors: I appear on behalf of the bar of the Commonwealth to present to the court the memorial prepared by a committee of the bar, in which it has been sought to embody the expression of the bar's respect for the character of Marcus Perrin Knowlton, lately Chief Justice of this court, and its appreciation of him as a man and as a magistrate.

In the discharge of this duty it is not fitting that I amplify the memorial. The details of his active life are adequately set forth therein, and there seems little to be added. In the presence of those who knew him intimately during his life, it does not become me to attempt his eulogy. That grateful duty has been appropriately assigned to others.

As an officer of the Commonwealth, however, I desire to express her gratitude for the distinguished service rendered by him, who, not long since, was the chief of her jurists. Over thirty-nine years of his life were devoted to public service. After serving in both our House of Representatives and Senate, he was appointed a Justice of the Superior Court, and from that court was elevated to the Supreme Judicial Court, where he served for twenty-four years, during over eight of which he was Chief Justice. His service was marked by industry, keen and penetrating thought, clarity and conciseness of expression, rare tact and unflinching courtesy. On the seventh day of May, last, by his death, the Commonwealth lost a beloved and distinguished citizen. On that day a life of exceptional and worthy achievement closed, a life devoted for the most part to the public service, a life whose obligations were met with courage, firmness and fidelity. It is,



indeed, fitting and appropriate that the bar and the court, representing an appreciative public, should take action to commemorate such a life. Lives like his make for the betterment of the character of our people and strongly influence our civilization. His work is done; its influence lives on. His life and character will serve as an inspiration to the living.

I now have the honor to present the memorial.

The Attorney General then presented the following memorial:

Marcus Perrin Knowlton, the son of Merrick and Fatima (Perrin) Knowlton, was born in Wilbraham, February 3, 1839.

He was fitted for college at Monson and was graduated at Yale in the class of 1860. His standing in scholarship was high and of even excellence in all the courses of the curriculum. In English composition he was unexcelled.

As a student he was grave, modest and reserved in his bearing, yet always kind, courteous, untiringly industrious, self-reliant and independent. He was faithful to every duty and every obligation. He was morally sound. This integrity in all things lasted without abatement to the end.

On September 24, 1862, he was admitted to the bar in Hampden County.

Thereafter his home was in Springfield. In the practice of law his success was immediate. The firm of Stearns and Knowlton and its successor, Knowlton and Long, were among the leaders in western Massachusetts. His intellectual powers matured early and knew no waning to the day of his death at Springfield on May 7, 1918.

He served in the City Council and represented his district both in the House and Senate.

As a lawyer he was an alert, prudent and sagacious counsellor with a wide knowledge of affairs, industrious and, above all, gifted with a rare common sense which gave working efficiency to his natural and acquired powers.

His conservative influence in the Legislature attracted general attention and approval, and in 1881 Governor Long with an instinctive appreciation of his fitness, appointed him a Justice of the Superior Court. He was then forty-two years of age. To the bar of eastern Massachusetts he was a comparative stranger. Hardly

had he taken his seat upon the bench before, as in the case of Chief Justice Bigelow, the bar recognized in him with unqualified satisfaction those qualities that make a successful *nisi prius* judge. He had deep special learning and wide general scholarship.

On the bench he was amazingly quick of apprehension, patient and attentive. He was transparently impartial. He had good judgment. He was a master of clear and orderly statement. His temper was equable. He had unusual mental and physical endurance. His industry was tireless. He worked without haste and without rest. His voice was well modulated and in it there was never a fretful note. His manner was dignified but gracious, his smile attractive but with no suggestion of levity. He was serious and sincere in all things. He had an intuitive sense of propriety. He had self-reliance without aggressiveness or arrogance. He had tact without cunning. He was a reader of the motives of men. With members of the bar he was cordial and friendly but not familiar.

He learned the time-saving art of stenography and his brief trial notes in shorthand usefully corroborated his retentive memory. In his court there was no wrangling. The supremacy of the bench was self-evident.

The rare combination of all these admirable characteristics made him an ideal trial judge. His was the twenty-second appointment to the bench of that able court.

He was appointed an Associate Justice of the Supreme Judicial Court on the fourteenth day of September, 1887, and was promoted to its Chief Justiceship in 1902 which position he held till his resignation by reason of an accident impairing his eyesight, on September 7, 1911, in the seventy-third year of his age. His resignation was universally regretted.

Thereafter he lived a quiet but not an idle life till the end came on the seventh day of May, 1918, in the eightieth year of his age.

He was honored with the degree of Doctor of Laws by his *alma mater* Yale and by Harvard and Williams.

By birth, education and environment he was a typical New Englander. He was proud of her history and institutions. He believed in the saving common sense of her people and had an abiding faith in her future. He was a conservative influence in the Commonwealth.

His work on the supreme bench was well and properly done. He was ambitious to excel not others but himself. He strove each day to better the work of yesterday and with the passing years he grew in worth. His fame with those who are to come after us will rest upon his written opinions. They are his monument, more enduring than bronze. They are unimpeachable witnesses to his greatness as a judge. They deservedly sustain the high reputation of a court whose decisions are cited with respect wherever the common law holds its seat.

He was a good son, a good father, a good husband, a good friend, a good neighbor, and a patriotic citizen.

Such a life is worthy of commemoration.

As a deserved tribute to the memory of Honorable Marcus Perrin Knowlton, the bar of the Commonwealth prays that this memorial be made a part of the records of this court.

Honorable Charles L. Long then addressed the court as follows:

There is, in the town of Wilbraham, a range of hills, which cover an area of many square miles, and which, for a long period of time, have been honored with the dignified name of "Wilbraham Mountains." High up among them, in a poor farming section called Glendale, is a small farm, on which is an unpretentious one story house, having but two living rooms on the ground floor, and, above them, immediately beneath the rafters, such meagre sleeping accommodations as the limited area allows. In that humble dwelling, Chief Justice Knowlton was born.

When he was but five years of age, his father sold the farm on which the family had lived, and purchased one in the adjoining town of Monson, on the road leading from the village to Palmer. It was there that he spent his boyhood days; about which little is known, or can be learned, as he was the last survivor of the family.

The period of elementary study having passed, young Knowlton entered the Monson Academy, an educational institution of repute then, and now, existing in the village of Monson, where he fitted for college. His father did not finance his college course. That he accomplished himself; and nothing more forcibly shows his youthful persistency and ability than the industrious manner in which he worked his way through college. For this purpose,

he resorted to teaching. He taught in the Westfield Academy one term, during his junior year, without interrupting his studies; and, during his senior year, he was instructor in mathematics in the Hopkins Grammar School in New Haven.

At college his rank was high. In his class at Yale, graduating one hundred and nine, he stood twelfth; in his junior and senior years he took third oration stand; and in his sophomore year received second prize for English composition. He was a member of a freshman society known as Gamma Nu, of the Phi Beta Kappa, and of the Brothers in Unity; and for three years maintained his physical well-being by dining at an eating club called "The Mackerels."

Having for a short time after his graduation performed the duties of principal of an institution then known as the Union School and located at Norwalk, Connecticut, his career as a teacher terminated by the destruction, by fire, of that institution's educational edifice. It was then that he turned his attention to the study of that profession which was to be his life's work, and which, at the bar and on the bench, was to be crowned with abounding success.

The office chosen by him, in which to begin his work as a law student, was, indeed, a modest one. It was located in the village of Palmer, in a little one story office building such as lawyers and doctors were, in those days, apt to occupy in the hamlets of the country; and was presided over by James G. Allen, a highly honorable county lawyer of excellent character, but of limited ability and practice. Evidently, young Knowlton soon realized the advisability of studying under the guiding influence of abler and wiser minds; for he left the office of "Squire" Allen, and entered that of Wells and Soule in Springfield.

It would have been impossible for him to have chosen more wisely; both members of that firm were men of high standing for ability and uprightness; and both subsequently became justices of this court.

Judge Knowlton absorbed a knowledge of the law rapidly, and speedily gained admission to the bar. He was then of a frail constitution, inclined to pulmonary trouble, which continued to threaten him for several years and which demanded of him the most careful attention to his habits of life. To this demand he

faithfully responded, with the result, that, in his subsequent years, he became possessed of a constitution and physique which enabled him to accomplish a vast amount of professional and judicial work.

His career at the bar began by opening an office and practising by himself. Within two years the firm of Knowlton and Greene was formed; but this was not of long duration; and, on being terminated, the firm of Stearns and Knowlton was established. Mr. Stearns was a brilliant lawyer, with a large practice, both civil and criminal. In the latter branch of the law he had acquired a great reputation, owing to the large number of cases he had defended, the importance of many of them, and the unusual success which had crowned his efforts. Friends of Judge Knowlton questioned the wisdom of his associating himself with Mr. Stearns by the formation of that firm. The doubt they entertained had for its foundation the radical difference, in habits, temperament and views of life, of the two men.

Notwithstanding these differences, each judged accurately of the value of the other as a business associate. The firm was a great success, professionally and financially; its field of activity was western Massachusetts; its reputation extended throughout the Commonwealth, and it continued, for many years, the leading law firm of western Massachusetts.

In the practice of the law, Judge Knowlton was exceedingly conscientious. Suits were not brought unless he was convinced that they possessed merit. He prepared his cases with great care and thoroughness; he tried them with marked ability, and all questions of law were ably argued. Clients had confidence in his judgment and uprightness, and jurors held him in high esteem.

It cannot be said that politics ever had any attraction to Judge Knowlton; and the services he rendered as a member of the Springfield city government, as a representative, and as a senator in the General Court of Massachusetts, were not the outgrowth of political ambition; but resulted from his willingness to do his share of public service and a desire to familiarize himself with the way in which those branches of government were conducted.

At the time of his appointment as a Judge of the Superior Court, he was unfamiliar with the principles of stenographic writing; indeed, he had never used a stenographer in the transaction of

his business; nor had any other lawyer in his section of the State. Realizing the probable usefulness of that art in the position to which he had been appointed, he obtained a treatise thereon, plunged into the study thereof, and so speedily mastered the subject that he was, in a very short time, able to use the same in taking notes of the evidence presented in the trials of cases before him; and, later, while a Justice of this court, he would, he informed me, write his opinions in shorthand and leave them with a typist, who, being able to read his stenographic characters, would transcribe them in typewritten form.

The wisdom of the appointment of Judge Knowlton to the bench of the Superior Court was speedily manifest. His ability to analyze evidence, his mastery of the law, the absolute impartiality and clearness of his charges to the jury, his honorable and courteous treatment of the members of the bar engaged in the trial of causes before him, and his abiding love of justice, soon convinced all who knew him, that his field of judicial activity could not long remain in the Superior Court, but would be found in the highest branch of the judiciary of this Commonwealth. Little surprise was there, therefore, when he was appointed a Justice of this court; and when, later, he became Chief Justice, it was universally recognized that his ability made his appointment to that position eminently wise.

When a man enters upon the duties of a Justice of this court, he becomes famous because of the quality of the work he performs in the hearing and decision of the important cases which come before him and of the opinions he writes which appear in our Massachusetts Reports. He has little time for social matters, and becomes less and less familiar with the faces, and has less and less knowledge of the people of the community in which he lives. Indeed, his high judicial rank seems to have the effect of causing the people to refrain from that freedom of social intercourse which formerly existed, and to treat him with a reserve which they seem to feel better becomes the dignity of his high judicial position.

While a great many recognized Chief Justice Knowlton as they would, from time to time, see him upon the streets, the number whom he knew was much less; and this caused him to say to me that there were few in the city in which he lived whom he knew and to remark to another that he was acquainted with such

a limited number that, if he were to die, there would be but few who would attend his funeral. He seemed absolutely to have failed to appreciate the reputation which had resulted from the work he had accomplished and the ability he possessed. Others, however, fully recognized it. The two great universities of New England, as well as Williams College, paid tribute to his greatness; and the Massachusetts Bar Association, representing the entire bar of the Commonwealth, honored his name, by resolutions, by addresses, and by presenting to the county of Hampden his lifesize portrait which now adorns the walls of the Court House in Springfield.

An affliction of the eyes, from which he subsequently recovered, caused Chief Justice Knowlton to resign his judicial position. Thereafter, until his death, he resided in Springfield, surrounded by all those comforts which an abundant property could bring to a man of his advanced years. His mind remained strong until the last; and, to a remarkable degree, he retained his physical strength until his final sickness. True, there was some slight impairment of the latter; but it was only nature's way of calling his attention to the fact that he had entered the domain of old age. This impairment was not so apparent to his friends, but was noticed and referred to by him. For a few weeks prior to his death, his physical strength seemed to be yielding to the attack of time. He grew feeble, became confined to his home, and, finally, in his eightieth year, after a terminal sickness of about two weeks, passed beyond our vision, into the great and mysterious unknown.

To my mind, he was, during all of the many years it was my privilege to know him, a follower of that rule which commands us to do unto others as we would that others should do unto us. The public at large, among whom he lived for so long, will remember him for his honest, upright and useful life; and the bar of the Commonwealth, now existing, and that of generations to follow, will view with admiration, the mind of the man whose clear, logical and convincing legal views appear in the many opinions written by him during his services upon the bench of this court, and which are to be found in sixty-five of the volumes of our Massachusetts Reports.

The Commonwealth loses by the death of such a man. The example of his life, his devotion to duty, the ideals for which he

stood, his universal uprightness and his industrious habits should be an inspiration to those of us who survive him and long remain a guide to those who, surviving us, shall take up the burdens of life as we shall lay them down.

Honorable Robert M. Morse then addressed the court as follows:

I made the acquaintance of the late Chief Justice in 1880. At that time we were both members of the Legislature and I had frequent opportunities to observe and admire his diligent and conscientious devotion to his important work, his legal acumen, his good sense and sound judgment and the charm of his personal intercourse. This early acquaintance ripened rapidly into warm friendship which grew still closer as the years went on and lasted throughout his long and honorable judicial career. He was a singularly likable man, modest, genial, interesting in conversation, with a ready smile and sparkling eye which lighted up his countenance and revealed the warmth of his nature. He showed himself at once equal to the serious responsibilities reposed in him as judge. If he was dealing with facts he was quick in analyzing complicated evidence and in reaching accurate conclusions. If he was considering legal propositions and hearing conflicting arguments he listened courteously and questioned intelligently. In the determination of cases he omitted no labor or research in examining not only all the authorities which had been called to his attention but all others which his ample legal learning suggested. His mind was well balanced, his industry was wonderful and his sense of justice profound. When, after weighing carefully opposing arguments in the light of all the study and examination which he had given them, he reached a conclusion, he stated it in an opinion expressed in clear and terse language and which carried with it the voice of authority. But in this presence it is as unnecessary to recount his supreme merits as a judge as it is impossible to express adequately the great sense of loss which his death has occasioned to us all.

William H. Brooks, Esquire, then addressed the court as follows:

I can add nothing of moment or interest to what has been so well expressed in the memorial just presented, the admirable biographi-



cal contribution, and the utterances of the distinguished gentlemen who have preceded me.

But, in view of the invitation extended to me by the Massachusetts Bar Association, I cannot forbear a brief individual tribute to the memory of the late former Chief Justice of our Supreme Judicial Court.

We are prone, I think, to speak of the dead, whom living we admired and respected, in terms which might appear to some of exaggerated praise. I shall endeavor to refrain from that error, for I know that Judge Knowlton would have deplored fulsome eulogy.

When I was admitted to the bar — more years ago than I like to contemplate — Judge Knowlton was engaged in the active practice of his profession. He did not participate in the actual trials of many causes, but he had the repute of possessing the capacity and inclination for extended intellectual labor, for research and for common sense and good judgment. He was famed as a safe counsellor. He was then at the zenith of his professional career.

The positions in public life which he then filled or to which soon afterwards he was chosen he regarded as public trusts, to be administered honestly, faithfully and conscientiously.

Before his elevation to the bench he seemed to me cold, calm, collected but courteous and considerate. He always seemed judicial. I never saw him when I thought he was either excited or perturbed. I do not remember his ever perpetrating a witticism or laughing aloud. The sense of humor was apparently absent or dormant. He had at times a smile kindly and alluring. His statements of propositions and questions in dispute were felicitous, direct and simple. After he became a judge there appeared no noticeable change in his demeanor except perhaps an additional seriousness.

In the brief time allotted, but little can here be said of the much that might well be said of him, the great magistrate. Much learning, much thought, it is said, has a tendency to cause the possessor to seem austere and unapproachable but, as I have already suggested, there was little, if any, change of characteristics from Mr. Knowlton, the practitioner, to Justice Knowlton, the judge. He was a human judge, a lover of justice and fair play; patient, tactful, helpful but ever firm and earnest.

One of his noble and endearing traits was the endeavor to render so far as was consistent with the proprieties of his position the unfamiliar pathway less arduous for the youthful and slightly experienced lawyer. But to the faults and mistakes of those of larger experience, who should have known better, he was not so complaisant.

His powers of application and concentration were proverbial, his ability for differentiation, discrimination and assimilation was well recognized.

His court opinions found in sixty-five volumes of our reports are of wide range, dealing with many intricate and diverse subjects. They are lucid and certain and of such nature that they are helpful and authoritative in cases other than the then instant case. He used language to express ideas and that did not confuse them. These opinions are treated with the utmost respect in other jurisdictions. He has added honor to our courts and learning to the law.

Mr. Webster, I think, said that he believed that "there is no character on earth more elevated and pure than that of a learned and upright judge and that he exerts an influence like the dews of Heaven falling without observation."

The subject of this memorial then, though dead, will continue to live in the impress he has left upon the law and in the masterly judicial opinions that he has written and in the influence that they do and will yield.

Moorfield Storey, Esquire, then addressed the court as follows:

My recollection of Chief Justice Knowlton goes back to the time when I first met him as a judge of the Superior Court presiding at the trial of a case in which I was counsel, and by that first experience of his quality were planted the seeds of a respect which grew with every year of his life. He was one of the best *nisi prius* judges that ever sat on the Massachusetts bench. His control of a trial was remarkable. He held counsel to their work, and discouraged most effectively those passages between them which take time, create ill-feeling, cloud the issue and awaken a feeling of partisanship in the jury. To him the court room was a chamber devoted to the ascertainment of truth, not "an arena for the exhibition of champions," much less a place for unseemly quarrels between officers of the court. His rulings on questions of evidence

were prompt and, once made, were not changed, his instructions to the jury were clear, his manner was calm and dignified, his courtesy unvarying, his work as a judge in all respects well done.

His record in the Superior Court made his promotion to the supreme bench inevitable, but when it came the pleasure with which we all regard the recognition of great merit and distinguished service was tempered by sorrow at the great loss which the trial court had sustained.

In the Supreme Judicial Court, both as an associate and as Chief Justice, he added to his reputation and to the reputation of the court, and on his knowledge of law, his strong common sense and his keen appreciation of justice the citizens of the Commonwealth pinned their faith for years. When an affection of his eyes, fortunately less serious than was feared, led him to resign his seat, the news was received with universal regret that we had lost a judge of such character, such ability and such ripe experience.

After he had left the bench and at an age when he was well entitled to enjoy the repose which he had so richly earned, he recognized the call of duty when he was asked to undertake the tedious and thankless task of trying to reorganize the bankrupt system of the Boston and Maine Railroad. He applied himself to the work with characteristic ability and patience and with an energy and industry surprising in a man of his years, and we may well hope that the result to which he contributed so much may prove of lasting benefit to all the States which are so largely dependent on that great railroad.

A man of the best New England type, simple, sincere, direct in his methods, free from any taint of self-seeking or self-advertisement, with a high sense of duty and great public spirit, he was a model citizen as well as a great magistrate.

While he lived he enjoyed in a high degree the respect and regard of Massachusetts, and when he died he left behind him a record of distinguished public service which the Commonwealth must ever be proud to remember.

Chief Justice Rugg responded as follows:

Mr. Attorney General and brethren of the bar: It is well for the bench and bar on appropriate occasions to pause in the midst of labors and say, with the sage of old, "Let us now praise famous

men, . . . men renowned for their power, giving counsel by their understanding, . . . Leaders of the people by their counsels, and by their knowledge."

There is singular fitness in paying tribute to the memory of the late Chief Justice Knowlton. For thirty years, in high judicial position upon two courts he served the public weal. The character of his work has given distinction to his name and has added lustre to the reputation of the Commonwealth. He was fortunate in his ancestry, birth and early life. The traditions of generations of strong New England forbears were his. He was born among the hills in the valley of the Connecticut. He had the priceless patrimony of the farmer lad in the training in self-reliance, resourcefulness, manual toil, and close touch with nature. His physical and intellectual fibre were strengthened by the free life which the farm offers to the healthy boy. Fitted for Yale College at Monson Academy, he was during many of his later years a member of the board of trustees of that institution. He maintained a high rank in his college class and was among the first dozen of its members in general excellence as a student throughout his course. His professional activity and association in Springfield brought him in close contact with the able men of an exceptional bar. He came to maturity familiar with the common concerns of life and enjoying a wide knowledge of men and affairs.

After six years upon the bench of the great trial court of the Commonwealth, he was appointed at the age of forty-eight an Associate Justice of this court, on the fourteenth of September, 1887. He became Chief Justice in December, 1902, and resigned on the seventh of September, 1911. The period of his service on the Supreme Judicial Court fell seven days short of twenty-four years.

Only five members of this court under the State government have performed such duties for a longer time. It is more than fifty years since the last of these passed from the scene of his earthly labors. They are: Samuel S. Wilde, 35 years, from 1815 to 1850; Lemuel Shaw, 30 years, from 1830 to 1860; Charles A. Dewey, 29 years, from 1837 to 1866; Samuel Putnam, 28 years, from 1814 to 1842; and Isaac Parker, 24 years, from January 28, 1806, to July 26, 1830.

A mere statement of the details of Chief Justice Knowlton's labors upon this court is impressive. His written opinions are to

be found in sixty-five volumes of the reports, the first being *O'Keefe v. Northampton*, reported in 145 Mass. 115, and the last, *Ryan v. Boston Elevated Railway*, 209 Mass. 292. The number of opinions written by him expressing the judgment of the court in decided cases was eight hundred and thirty-seven as Associate Justice and seven hundred and thirty-three as Chief Justice, making a total of fifteen hundred and seventy. The number of his dissenting opinions was twenty-nine, only four of which were delivered while he was Chief Justice. It is interesting to note that the opinions of Chief Justice Shaw, serving six years longer, are to be found in fifty-five volumes of our reports, beginning with 9 Pick. and ending with 15 Gray, and that the number bearing his name was twenty-one hundred and sixty-one. No other member of the court has approached very near to either of these in number of opinions written. No other magistrate in the history of Massachusetts has contributed so much to the visible fabric of our jurisprudence as did the late Chief Justice, with the single exception of Chief Justice Shaw.

Number of opinions written by itself alone is a slender measure of judicial accomplishment. It may be simply evidence of industry and ease of composition. Quality of work is the real test of achievement. Gauged by the most exacting standard the late Chief Justice was in the first rank of great judges. His knowledge of law was extensive and profound, his discernment of legal analogies was quick and accurate, his reasoning powers were of the highest order. His vision was broad, his poise unperturbed, his perception keen, and his apprehension of the ultimate reach of principles unclouded. While his memory of decided cases was not extraordinary, his grasp of fundamental doctrines was wide and sure. He saw them plainly. He appreciated to an exceptional degree their bearings in application to shifting facts and changing conditions. The motions of his mind were rapid and his intellectual processes accurate; but he was patient and painstaking. His written judgments combined in rare degree clearness of thought, lucidity of expression, and insight as to governing principles. A remarkable brevity was his: it excluded everything superfluous and omitted nothing essential. The style of his composition was a near approach to the ideal. His vocabulary was made up of plain words in common use. His sentences were not pro-

tracted and were never involved. His language was unobtrusive. His diction was pure. In reading what he has written one thinks only of the ideas expressed and never of the medium through which they are conveyed. He seldom wrote long opinions. His thought was clear and concise. He was able to express it in such luminous phrase that it could not easily be misunderstood. He compressed into narrow compass the controlling rules of law with sufficient completeness of definition for the decision of the case at hand. His statement was comprehensive in its sweep. He dealt ordinarily with main propositions and did not undertake to cover subsidiary ramifications. He realized that a short opinion is more inviting to the eye than a long one and therefore more likely to be read and to influence the currents of legal thought and action. He understood that the power of plain and terse expression of important legal doctrines is an attribute of no mean value. There was no redundancy either in his thought, his speech or his writing.

He possessed attainments in scholarship. But he was thoroughly grounded in the practical. He tested every argument by its effect upon the affairs of everyday life. The wisdom of the marketplace was his. He had insight into human nature and intuition of the secret springs which move men to action. He read the newspapers constantly and kept in touch with all that was passing in the world. Great common sense was his and it never deserted him. However much he may have enjoyed philosophical speculations or the beauties of logic, he never lost sight of the fact that the law is a practical science designed to promote the general welfare, to conserve the common happiness, to preserve public and private safety, and to protect all the people in the enjoyment of life, liberty and property. The sense of justice was instinctive with him. Of course he was no respecter of persons. Each litigant stood before him alike indifferent. He did "everything for justice, nothing for fear or favor." He recognized the necessity that the courts in performing their duties look to the present and to the future and not exclusively to the past. In a published article he expressed his own conception of the judicial function in these words: "With all the conservatism that is necessary in adapting new laws to existing conditions and the customs of the people, the courts have gone forward hand in hand with the law-making power to create a system of jurisprudence that shall be worthy

of a people of the highest intelligence. While statutes have been enacted for the simplification of procedure, the courts of their own motion have often disregarded precedents in non-essentials and have sanctioned the omission of unnecessary verbiage and have encouraged the statement of facts without formality, in clear and simple terms. . . . The distinctive feature of the common law is that it is a growth, which has always adapted itself to new discoveries and changed conditions and which is still capable of boundless expansion and adaptation to meet the requirements of a changing world."

As Chief Justice his administration of the business of the court was efficient. Its work went forward with due deliberation, without friction, without haste and without delay. He had a faculty of harmonizing divergent views and of convincing differing minds.

He approached the consideration of every question of constitutional law with the comprehension of a statesman. He examined it from every point of view. His numerous opinions upon this branch of the law in general have been confirmed in their soundness by the test of experience and by analytical criticism and review.

In consultation with associates the scope of his reasoning and his elucidation of the underlying foundations of the law revealed a powerful intellect, of marvelous range and incisiveness, of great quickness and precision and of wide vision and sound judgment. His attitude was that of mutual conference and helpfulness. Under his guidance discussion never degenerated into controversy. When the likelihood of further enlightenment had closed, the time for final decision had come. His impulses were generous. So far as lay in his power, everybody was accorded kindness as well as justice.

After retirement from the bench his business sagacity received signal recognition in his selection by the federal court as chairman of the board of trustees whose duty involved for several years in part the management and reorganization of the Boston and Maine Railroad.

He was a man of firm conviction and steadfast adherence to his matured conclusions. But he was open minded so long as any new arguments were available. He was of dauntless courage and never hesitated to stand alone, if need be, on what seemed to him to be the sound ground. His manner both upon the bench and

elsewhere combined graciousness with dignity. His deportment toward the bar was unexceptional.

The performance of judicial work was the absorbing element of his life. He was not much given to the making of public addresses, although whenever he spoke, it was with the strength of elevated thought. The papers prepared by him for The Club in Springfield, of which he was long an interested member, manifest breadth of literary taste and intimate familiarity with the best of English literature.

The history of British and American political institutions was to him an attractive field for study. He was imbued with the spirit of Massachusetts. He knew thoroughly the annals of her colonial and provincial periods and her legal, social and industrial growth and development under the State government. When he declared her law, he spoke as one skilled in all her lore.

His sympathies were deep and broad. He enjoyed the activities of out of doors. For many years he was an habitual horseback rider. Latterly he recruited his strength on the golf links. He was of medium height, erect in carriage, of alert and elastic step. His raven hair and slightly silvered beard gave him the appearance in later life of one much younger than he was.

The great historian of European morals has said that "no character can attain a supreme degree of excellence in which a reverential spirit is wanting." The late Chief Justice was constant in his attendance upon public worship. He manifested thereby not only a firm belief in the eternal verities of religion, but an abiding reverence for whatever things are holy and of good report. His blameless character, his lofty ideals of personal, civic and official duty, and the simplicity of his life, commanded the respect of the public and endeared him to those who were privileged to have an intimate acquaintance with him.

A few years ago a justice of this court, since retired, said to a leader of our bar, whose reputation was also national, "I think the time will come when the bar will regard Chief Justice Knowlton as the equal of Chief Justice Shaw." The reply was, "That time has already come." In different generations, under widely changed conditions, each of these great chief justices in his own way with talents adapted to the times contributed in signal degree to the development of our jurisprudence.



It is with consciousness of deep veneration and profound personal obligation that I have been the voice of the court in speaking of Chief Justice Knowlton. Possibly this feeling has colored what has been said; but it seems an inadequate characterization of a mighty man and an eminent judge. He was vastly more than our words declare. Fortunate indeed is the State whose life has been enriched by the prolonged services of such a judge.

The motion of the Attorney General that the memorial be extended upon the records of the court is granted.

The court will now adjourn.

# INDEX.

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## ABATEMENT.

Plea in abatement to an indictment on the ground that more than the grand jury and prosecuting officer and stenographer were present with a witness during his examination. *Commonwealth v. Harris*, 584.

Of an action at law, see that subtitle under PRACTICE, CIVIL.

Of a tax, see that subtitle under TAX.

## ABORTION.

At the trial of an indictment under R. L. c. 212, § 15, for unlawfully attempting by the use of a certain instrument to procure the miscarriage of a certain woman, in consequence of which she died, the dying declarations of the woman, made when she fully realized that she had no hope of recovery, contained in the form of answers to questions in a paper subscribed and sworn to by her before a justice of the peace, who testifies to having taken down the answers as nearly as he could in writing long hand, are admissible in evidence, and the presiding judge properly may allow the contents of the paper to be read to the jury. *Commonwealth v. Wagner*, 265.

The statements of the woman contained in such a paper, which describe her purpose in seeking medical advice and assistance from the defendant and her conversations with him, are competent evidence, to which the declarant could have testified as a witness, if living. *Ibid.*

At the trial of such an indictment the medical examiner who performed the autopsy on the body of the woman, and whose qualification as an expert is unquestioned, properly may be allowed to testify as to what in his opinion was the cause of her death. *Ibid.*

## ACTIONABLE TORT.

If a manufacturer of ovens installs in the part of a building used by a tenant operating a bakery a baker's oven which the manufacturer annexes to the building, retaining the title to the oven under a contract of conditional sale made with the tenant, and the manufacturer does the work of installation so negligently that when the oven is used the building is set on fire and injured, the owner of the building has a right of action against the manufacturer to recover damages for the natural consequences of the manufacturer's negligence, although there was no contractual relation between the owner and the manufacturer, who when he installed the oven did not know who owned the building. *Barabe v. Duhrkop Oven Co.* 466.

## ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

## AGENCY.

### *Existence of Relation.*

- A driver in the general employ of an ice company, who was let for hire by the ice company with a pair of horses and a wagon to a coal company and was injured, was held, under the circumstances, at the time of his injury to have been acting as an employee of the coal company and not as an employee of the ice company, and it was ordered that a decree of the Industrial Accident Board awarding him compensation to be paid by the insurer of the ice company should be reversed. *Scribner's Case*, 132.
- A suit in equity by a married woman, seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, was dismissed because the debt secured by the mortgage was paid in full by the mortgagor to the plaintiff's husband who applied the money in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question. *Clark v. Young*, 156.
- In an action for personal injuries sustained by being struck by a motor car of the defendant, proof that the defendant owned the car, without any evidence that he was in control of it or that the person driving it was his servant, does not entitle the plaintiff to go to the jury. *Phillips v. Gookin*, 250.
- A steel contractor, who under a contract with a builder furnished to the builder the structural steel required for a building to be constructed by the builder under a contract with a boiler company, upon the builder becoming bankrupt, was held not entitled to maintain a suit in equity against the boiler company and the trustee in bankruptcy of the builder, seeking to have the boiler company ordered to pay the plaintiff for the structural steel furnished for the building instead of paying the contract price to the trustee in bankruptcy of the builder, even if it was agreed between the boiler company and the builder that the boiler company as principal should pay all bills for materials furnished by subcontractors, that being a promise made for the steel company's benefit to another person, from whom alone the consideration moved and who was not his agent. *New England Structural Co. v. James Russell Boiler Works Co.* 274.
- On the evidence at the trial of an action for the price of five tons of coal, where the defendant testified that he bought the coal from a person other than the plaintiff and paid for it by crediting the price as part of the purchase money for a motor cycle which he delivered to such person under a contract of conditional sale, it was held that the judge properly refused to rule that "There is no evidence on which the jury can find that [the third person] was authorized as the plaintiff's agent to purchase any motor cycle with title to be conferred upon said [third person] at the time of the purchase." *Farnum v. Ramsey*, 286.
- In an action against two persons for a broker's commission, the second defendant was the sister of the principal defendant and was one of the three holders

of all the stock of the corporation, but there was no evidence that she employed the plaintiff or that the principal defendant was authorized to employ him in her behalf, and it was held that a verdict should be ordered in her favor, the fact that she derived benefit from her brother's employment of the plaintiff being no evidence of her liability. *Johnstone v. Cochrane*, 472.

Evidence at the trial of an action, by an administrator against copartners doing business under the name of an ice cream company, for causing the death of the plaintiff's intestate by running over him with a motor truck, which was held to warrant findings that at the time of the accident the driver of the truck was in the defendants' employ and was engaged in their business. *Buckley v. Sutton*, 504.

#### *Scope of Authority or Employment.*

- In determining the character and extent of the authority given by a power of attorney, it is permissible to examine all the circumstances under which the instrument was executed, so far as those circumstances were actually or presumably present in the minds of the parties, for the purpose of enabling the court to understand the situation of the parties and to apply their words to the right subject matter in the light of all the attendant conditions, and for this purpose oral evidence is admissible. *Warner v. Brown*, 333.
- In a suit in equity to enforce an alleged right of the plaintiff to have made to him a transfer of certain shares of mining stock, the defendants relied on a transfer of the beneficial interest in the shares purporting to be made by a business associate of the plaintiff under the authority contained in a power of attorney executed by the plaintiff and it was held that, on all the evidence, a finding of the trial judge, that under the power of attorney the transfer in question was authorized, not only was not plainly wrong but that it was supported fully by the evidence, and that the bill should be dismissed. *Ibid.*
- In the suit in equity above described it was said that, even if the person to whom the power of attorney was given had been false to the plaintiff and had violated his duty toward him, that would not have affected the defendants if they had no knowledge of it and acted as reasonable men in good faith in relying upon the terms written in the power of attorney. *Ibid.*
- In a claim under the workmen's compensation act this court found it unnecessary to consider whether the evidence justified a finding that the superintendent of the employer acted as the authorized agent of the insurer, and, if he did, whether he had authority to make and sign in behalf of the insurer an agreement with the employee as to compensation for his injury after six months had expired. *Courtney's Case*, 469.
- Evidence at the trial of an action, by an administrator against copartners doing business under the name of an ice cream company, for causing the death of the plaintiff's intestate by running over him with a motor truck, which was held to warrant findings that at the time of the accident the driver of the truck was in the defendants' employ and was engaged in their business. *Buckley v. Sutton*, 504.
- What are injuries arising out of and in the course of the employment of a workman for which he is entitled to compensation under the workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

*Agent's Compensation.*

Action for a commission for procuring the sale of real and personal property of a corporation of which the defendants were principal stockholders. *Johnstone v. Cochrane*, 472.

Broker's commission, see **BROKER**.

*Agent's Duty of Fidelity.*

Upon facts found by a master to whom was referred a suit in equity by a woman against her sister and her sister's husband to set aside a note and a mortgage given by the plaintiff to the defendants, it was held that a failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants under the circumstances to disclose to the plaintiff every material fact which affected the value of the property or which might induce or determine her action. *Fardy v. Buckley*, 377.

In the case above described a master found "that the defendants did not fraudulently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," and it was held that, in view of the other facts found, this finding was immaterial, as, where such fiduciary relations exist, the duty to disclose does not depend on the motives or intentions of the persons whose duty it is to make the disclosure. *Ibid*.

In the suit above described the bill contained a prayer for general relief, and it was said, that the plaintiff not only had the right of rescission, but, if she elected to keep the property, might have the defendants ordered to account to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her. *Ibid*.

In the same case it was held that it also was irrelevant that the property might have been worth at the date of the sale more than the plaintiff paid for it. *Ibid*.

*Disrespect and Rudeness.*

Although an employee rightly may be discharged for disrespectful words or conduct, his employer has not an absolute right to discharge him for disrespect and rudeness arising from an innocent misunderstanding of facts and not amounting to insubordination. *McIntosh v. Abbot*, 180.

*Fellow Servant.*

In an action for personal injuries by an employee of an independent contractor against the proprietor of a ship upon which the plaintiff was working, negligence of the plaintiff's employees or of employees of the defendant working with the plaintiff is no defence. *Duart v. Simmons*, 313.

*Waiver of Principal's Right.*

The fact, that an agent of a person in the military service of the United States, who had charge of land beneficially owned by such person subject to a mortgage, had full knowledge of a foreclosure sale and acquiesced in and

actively approved of it, does not deprive such military owner of his right given by U. S. St. 1918, c. 20, §.302, because the right is a personal one which cannot be waived by an agent. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

*Ratification or Repudiation of Agent's Acts by Principal.*

In an action against an oil company for personal injuries resulting from negligence of an employee of the defendant in leaving unguarded an excavation for a tank on premises of the plaintiff's employer, it was held that an instruction requested by the defendant, that there was no evidence that the act of the defendant's driver in digging up the tank was within the scope of his employment, was refused rightly, as there was evidence of the driver's authority to do the work and that, even if he originally had lacked such authority, his acts were ratified by the president's order to go on with the work and by the defendant's acceptance of payment for it from the landowner. *O'Neil v. National Oil Co.* 20.

*Independent Contractor.*

In an action for personal injuries by an employee of an independent contractor against the proprietor of a ship upon which the plaintiff was working, negligence of the plaintiff's employees or of employees of the defendant working with the plaintiff is no defence. *Duart v. Simmons*, 313.

*Real Estate Broker.*

See BROKER.

*Employer's Liability.*

See that subtitle under NEGLIGENCE.

*Workmen's Compensation Act.*

See that title.

*Officers and Agents of Corporations.*

See appropriate subtitle under CORPORATION.

AMENDMENT.

See that subtitle under PRACTICE, CIVIL; EQUITY PLEADING AND PRACTICE.

APPEAL.

Where upon a record presented to this court upon an attempted appeal it appeared that no question was pending, it was ordered that the case should be dismissed from this court. *Butland v. Hein*, 242.

An attempted appeal to this court, not taken according to law, is not before the court and cannot be considered. *Martin's Case*, 402.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

### AQUEDUCT.

Suit in equity to enjoin infringement of an easement to draw water from a spring on land of another by means of a private aqueduct over land of a third person. *Wellington v. Rawson*, 189.

### ASSIGNMENT.

Where a policy of life insurance names no beneficiary and contains a provision that it shall be void "if the policy be assigned or otherwise parted with," and the insured delivers this policy to a creditor, telling her it is to secure her in case he shall not live to pay what he owes her for board, and such creditor thereafter pays the premiums on the policy until the death of the insured, this gives the creditor no right to maintain an action on the policy. *Pettit v. Prudential Ins. Co. of America*, 394.

An assignment by a debtor, by order of a municipal court in poor debtor session, of all his right, title and interest in land previously conveyed by him with intent to defeat, delay or defraud his creditors conveys no legal or equitable title as against his grantee. *Bress v. Gersinovich*, 563.

### ATTACHMENT.

In a suit in equity by a mortgagee of real estate for the cancellation of a discharge of the plaintiff's unpaid mortgage which had been entered by mistake on the margin of the record in the registry of deeds, it appeared that two of the defendants had attached the real estate after the apparent discharge of the mortgage on the record and without knowledge of the mistake, and it was held that the bill must be dismissed as to the defendant attaching creditors, whose liens took precedence to the plaintiff's mortgage. *Waltham Co-operative Bank v. Barry*, 270.

Merely entrusting the possession of a chattel to a third person and permitting him to use it for many years do not estop the owner from asserting his title to the chattel against one attaching it as the property of such third person. *Orcutt v. Gast*, 305.

A sale on execution after a levy on land conveyed by the debtor with intent to defeat, delay or defraud his creditors gives only a right to try the title of the defendant or fraudulent grantee by a writ of entry commenced within one year after the return of the execution. *Bress v. Gersinovich*, 563.

### ATTORNEY AT LAW.

Disallowance of a petition under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 13, as amended by St. 1914, c. 708, § 7, by an administrator of the estate of a deceased employee for compensation from the insurer for legal services rendered in connection with his appointment because it did not appear that the appointment of the administrator required for carrying out the provisions of the act was "not otherwise necessary." *Mellon's Case*, 399.

### ATTORNEY, POWER OF.

In determining the character and extent of the authority given by a power of attorney, it is permissible to examine all the circumstances under which

the instrument was executed, so far as those circumstances were actually or presumably present in the minds of the parties, for the purpose of enabling the court to understand the situation of the parties and to apply their words to the right subject matter in the light of all attendant conditions, and for this purpose oral evidence is admissible. *Warner v. Brown*, 333.

In a suit in equity to enforce an alleged right of the plaintiff to have made to him a transfer of certain shares of mining stock, the defendant relied on a transfer of the beneficial interest in the shares purporting to be made by a business associate of the plaintiff under the authority contained in a power of attorney executed by the plaintiff and it was held that, on all the evidence, a finding of the trial judge, that under the power of attorney the transfer in question was authorized, not only was not plainly wrong but that it was supported fully by the evidence, and that the bill should be dismissed. *Ibid*.

In the suit in equity above described it was said that, even if the person to whom the power of attorney was given had been false to the plaintiff and had violated his duty toward him, that would not have affected the defendants if they had no knowledge of it and acted as reasonable men in good faith in relying upon the terms written in the power of attorney. *Ibid*.

#### AUDITOR.

See appropriate subtitle under PRACTICE, CIVIL.

#### AUTOMOBILE.

See MOTOR VEHICLE.

#### BAILMENT.

Merely entrusting the possession of a chattel to a third person and permitting him to use it for many years do not estop the owner from asserting his title to the chattel against one attaching it as the property of such third person. *Orcutt v. Gast*, 305.

A purchaser, who, upon examining goods shipped to him to fulfil a contract of sale by sample, discovers that the goods do not conform to the sample and reships them to the seller, in doing so is a gratuitous bailee of the goods. *Altman v. Aronson*, 588.

A gratuitous bailee is liable to his bailor only for damages caused by bad faith or gross negligence for which he is responsible. *Ibid*.

At the trial of an action by a bailor against a gratuitous bailee for damages resulting from the fact that the defendant in shipping the bailed goods by express to the plaintiff stated to the express company as their value \$50 when the goods were worth over \$280, it was held that a rule laid down by the judge in his charge would impose upon the defendant liability for simple negligence when he was liable only for bad faith or gross negligence, and that the instruction was erroneous. *Ibid*.

It also was said that on the evidence, with the testimony of the defendant's employee disbelieved, a finding was warranted that the defendant was grossly negligent in reshipping the silk to the plaintiff with a valuation of not more than \$50, when its value was more than \$280. *Ibid*.



## BANK.

TRUST COMPANY, see that title.

## BANKRUPTCY.

In an action upon a non-negotiable promissory note with an indorsement, "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand," where it did not appear that the defendant ever had been subject to proceedings in bankruptcy, it was held that it was not necessary to determine the precise effect of the promise to pay upon demand as "a preferred note to be paid regardless of any future proceedings in bankruptcy," because, whatever the nature of this promise might be, it was not so illegal or so contrary to public policy as to vitiate the entire instrument and that its presence did not destroy the binding character of the contract sought to be enforced. *McQuesten v. Spalding*, 301.

Evidence at the hearing of a suit in equity by a trustee in bankruptcy against a bank and its vice president, seeking a conveyance to the plaintiff of certain real estate conveyed by the bankrupt within four months of his adjudication to the defendant vice president for the bank's benefit, was held to warrant findings that at the time of the conveyance the bankrupt was insolvent, that the bank and the vice president had reason to believe that he was so and that the conveyance was intended to and did enable the bank to obtain a greater percentage of its debt than did other creditors of the bankrupt of the same class. *Underwood v. Winslow*, 595.

## BILLS AND NOTES.

*Validity.*

Certain non-negotiable notes, with an indorsement by the maker, "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's . . . estate," was held to be valid. *McQuesten v. Spalding*, 301.

In a action upon the note above described there was nothing to show that the defendant ever had been subject to proceedings in bankruptcy, and it was held that it was not necessary to determine the precise effect of the promise to pay upon demand as "a preferred note to be paid regardless of any future proceedings in bankruptcy," because, whatever the nature of this promise might be, it was not so illegal or so contrary to public policy as to vitiate the entire instrument and that its presence did not destroy the binding character of the contract sought to be enforced. *Ibid.*

No action can be maintained between the parties to a promissory note which was given pursuant to the provisions of an unlawful contract. *Moss v. Copehof*, 513.

Upon the evidence at the trial of an action of contract on certain promissory notes, where the defence was set up that the notes were void because given in pursuance of an unlawful agreement, it appeared that the notes were given by the two defendants to the plaintiff in pursuance of a contract in writing between the three, and it was held wrong to order a verdict for the plaintiff, because the jury could have found that the contract between the

parties was to pay the plaintiff \$600 from the funds of the corporation, when nothing was due to him, and to apply the amount on account of his indebtedness "for unpaid stock subscription," which would make the contract unlawful and void and in violation of St. 1903, c. 437, § 14. *Moss v. Copefelo*, 513.

#### *Non-negotiable Note.*

A note payable on demand, with an indorsement signed by the maker: "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's (M A S) estate," was held to include, in addition to the promise to pay the principal sum on demand, alternative promises of payment, one to pay on demand regardless of any future proceedings in bankruptcy and the other to pay on the settlement of the defendant's mother's estate. *McQuesten v. Spalding*, 301.

In an action upon the note above described there was nothing to show that the defendant ever had been subject to proceedings in bankruptcy, and it was held that it was not necessary to determine the precise effect of the promise to pay upon demand as "a preferred note to be paid regardless of any future proceedings in bankruptcy," because, whatever the nature of this promise might be, it was not so illegal or so contrary to public policy as to vitiate the entire instrument and that its presence did not destroy the binding character of the contract sought to be enforced. *Ibid.*

In the same action it was held that the instrument sued upon, although not a negotiable note, was clearly a valid contract. *Ibid.*

It also was held that the plaintiff had the right to elect upon which of these promises to rely, and that he had elected to rely on the promise of the defendant to pay on the settlement of his mother's estate, so that the statute of limitations began to run only from the time of such settlement. *Ibid.*

#### *Payment.*

Acceptance by the holder of an overdue promissory note, which contains no express provision for the payment of interest, from indorsers of the face of the note, with an agreement that it was accepted in full satisfaction of all demands and that an entry should be made in an action against the indorsers of judgment satisfied, was held to entitle the maker of the note to an entry of judgment in his favor in an action against him, no claim of the plaintiff to recover interest from the maker being open. *Paul Revere Trust Co. v. Castle*, 129.

#### BOND.

Docket entries of a court from which a writ of supersedeas purports to have issued and an indorsement upon the bond signed by the clerk of the court, from which, it was held, it sufficiently appeared that all proper things were done by or by direction of the court and that it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue. *Keith v. Rosnosky*, 409.

Where a surety company has become the surety upon a bond of a building contractor, given by him to a landowner for the faithful performance of a

Bond (*continued*).

contract to build a house on the land of such owner to be completed by November 1 of that year, if without the knowledge of the surety the landowner and the contractor make an agreement extending the time for the completion of the house until Christmas of that year, the surety is discharged. *Schwartz v. American Surety Co. of New York*, 490.

Whether a surety on a bond for the faithful performance of a contract between a landowner and a building contractor can be held under any circumstances to have ratified a further contract made between the landowner and the contractor for their own benefit and convenience, or whether the principle of ratification has no application to such a case, here was mentioned as a question which it was unnecessary to pass upon because there was no evidence of the necessary elements of a ratification. *Ibid*.

The surety on a bond, which was given to ensure the faithful performance of an unlawful contract, cannot be held liable for a breach of the bond by the principal, because the courts will not enforce the obligation of an unlawful contract. *Boylston Bottling Co. v. O'Neill*, 498.

Extent of recovery by a city in an action against a street railway corporation upon a bond, given in compliance with a condition imposed by the grant of an extension of location made to it by the aldermen of the city, as it related to the cost of maintenance of certain bridges. *Northampton v. Northampton Street Railway*, 540.

#### BOSTON ELEVATED RAILWAY COMPANY.

Spec. St. 1918, c. 159, providing in substance for the leasing to the Commonwealth of the road and property of the Boston Elevated Railway Company to be operated for a limited time by public officers upon the payment of a fair rent, is constitutional. *Opinion of the Justices*, 603.

A statute changing Spec. St. 1918, c. 159, by providing for a maximum fare of five cents upon the lines of the Boston Elevated Railway Company, and by providing that, if the income thus received shall be inadequate to meet the cost of service, the deficiency shall be made up by payments from the treasury of the Commonwealth out of moneys to be borrowed, and that the sums so advanced shall be assessed upon the cities and towns using the service of the company, would be constitutional. *Ibid*.

A statute changing Spec. St. 1918, c. 159, by providing for reducing the fares to be charged on lines of the Boston Elevated Railway Company by the payment by the Commonwealth to that company of an amount equal to the rentals due from the company for the use of subways and for the ultimate assessment of the sums so paid by the Commonwealth upon the cities and towns using the service of the company, would be constitutional. *Ibid*.

The General Court has the right to authorize the operation of the lines of the Boston Elevated Railway Company by the Commonwealth through trustees appointed by the Governor, because the transportation of the public thus provided for is a public purpose; and there is no constitutional requirement that the operation of the lines for such a purpose by the public authorities shall be at cost or at a profit. *Ibid*.

A statute of the character described would be constitutional only after a legislative determination that the value of the private property thus devoted to a public use required such contribution from the Commonwealth in addi-

tion to all other sources of income in order that the owners of the property might receive a fair return. *Opinion of the Justices*, 603.

Such a legislative determination was made by Spec. St. 1918, c. 159, §§ 5, 6, in fixing the "dividends" to be paid upon the shares of the Boston Elevated Railway Company. *Ibid.*

## BROKER.

### *Commission.*

The well established principle here was followed, that a broker earns a commission when he brings the property which he is employed to sell to the attention of a third person and then turns that person over to his employer and the property is sold to such third person as the result of the negotiations begun with him by the broker. *Johnstone v. Cochrane*, 472.

In an action for a commission for procuring the sale of the property of a manufacturing corporation, of which the defendants were the controlling stockholders, where it appears that the plaintiff procured a purchaser who bought the property in question for \$250,000, of which \$160,000 was paid in cash and the remaining \$90,000 in preferred stock of a new corporation, it was held that certain testimony of the plaintiff on his cross-examination did not show that the plaintiff's authority was limited to a sale for \$250,000 in cash. *Ibid.*

In the action above described, testimony of the principal defendant that, "From that time on he [the plaintiff] had the negotiations for the sale of the plant personally with Mr. S [the representative of the purchaser] and the interests that he represented who finally purchased," was held to entitle the plaintiff to go to the jury. *Ibid.*

In the same case it also was held that the fact, that the property for which the plaintiff procured a purchaser belonged to a corporation, of which all the stock was owned by the principal defendant, his sister and his father, did not necessarily make the employment of the plaintiff to procure a sale of the property an employment by the corporation, there being evidence that the principal defendant personally employed the plaintiff to find a purchaser for the property. *Ibid.*

In the case above described, the second defendant was the sister of the principal defendant and was one of the three holders of all the stock of the corporation, but there was no evidence that she employed the plaintiff or that the principal defendant was authorized to employ him in her behalf, and it was held that a verdict should be ordered in her favor, the fact that she derived benefit from her brother's employment of the plaintiff being no evidence of her liability. *Ibid.*

## BROMFIELD STREET METHODIST EPISCOPAL CHURCH IN BOSTON.

Under a deed of land to trustees to hold it forever in trust and to erect thereon a house of worship "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and Discipline which from time to time may be agreed upon and adopted," it was held that the beneficiary of the trust was the local religious society which was formed

Bromfield Street Methodist Episcopal Church in Boston (*continued*).

in connection with the church edifice that was built by the trustees from the trust fund on land purchased for the purpose from that fund and which occupied that edifice as their place of worship from the time of its erection until its sale under legislative authority. *Attorney General v. Armstrong*, 196.

The religious society referred to above was called the Methodist Religious Society in Boston and comprised what formerly were two societies, merged into one and bearing the name of the original society by order of the bishop of the Methodist Episcopal Church in accordance with the discipline of that church, and it was held that the property rights of the Methodist Religious Society in Boston, as it was before the merger, vested in the consolidated society bearing the same name, for whose benefit it was the duty of the trustees to hold and administer the fund derived from the lawful sale of the church land and building, conforming to the rules and discipline of the church from time to time agreed upon and adopted. *Ibid.*

An appointment of trustees by the Supreme Judicial Court under its general chancery powers, in a suit in equity invoking its aid, because at that time there were no trustees chosen in accordance with the terms of the trust deed, was held not to abrogate certain provisions of the trust deed providing in express terms for the perpetuation of the board of trustees and did not impose forever on the court the duty of selecting and appointing trustees. *Ibid.*

And it also was held that, a board of trustees having been constituted by the court, vacancies in that board must be filled according to the terms of the trust deed, which had become operative for that purpose. *Ibid.*

In the case described above it was held that the requirement in the trust deed that a trustee must be and continue to be a member "of said Church" meant a member of the local religious society. *Ibid.*

In the same case it appeared that by the practice of the Methodist Religious Society in Boston, as followed for many years, whenever one of the trustees ceased to be affiliated with that society, his position as trustee was treated as vacated. It appeared that two trustees, who at the time of their appointment by the court were members of the Methodist Religious Society in Boston, afterwards transferred their membership from that society to other local societies and it was held that, by force and effect of the trust deed, these two trustees by their change of membership had vacated their offices as trustees. *Ibid.*

In the same case it appeared that two of the trustees appointed by the court were not members of the Methodist Religious Society in Boston, although members of the Methodist Episcopal Church, and had not joined afterwards the local society. There was nothing in the bill directed to their removal and no prayer for their removal, and it was held that the removal of these trustees was not required. *Ibid.*

The circumstances were held not to require the removal of another trustee appointed by the court, who was not a member of the Methodist Episcopal Church but belonged to another denomination. *Ibid.*

The removal of a trustee who had presented to his co-trustees a bill for \$809 and interest for reimbursement for an alleged expense which he had incurred in the course of his duty as a trustee, when he had settled the claim for \$277 only, was held to be warranted, although during the pendency of the suit

he had paid back to the trustees the money thus paid to him under the assignment. *Attorney General v. Armstrong*, 196.

### CAMBRIDGE.

The mayor, the superintendent of streets and the auditor of the city of Cambridge, which was subject to the municipal indebtedness act, were held to have been right in refusing to approve the alleged wages of certain city laborers claimed by them under an ordinance attempted to be passed by the city council raising the rate of the wages of the classes of laborers in question beyond the amount provided for by the budget for the fiscal year in violation of § 20 of the municipal indebtedness act. *Shannon v. Mayor of Cambridge*, 322.

In a petition by certain laborers to enforce such approval, it was said that, as the petition must be dismissed, it was not necessary to consider whether, if the petitioners had been entitled to the wages claimed by them, they could have sued for such wages in actions of contract so that they would not have needed, nor have been entitled to, the writ of mandamus sought. *Ibid*.

### CAPITAL AND INCOME.

A beneficiary entitled to the income from a trust fund by assenting in writing to the allowance of a probate account of the trustees of the fund, in which certain shares of capital stock are enumerated among the securities constituting the principal of the trust fund, is not estopped from contending in a suit in equity against the trustees that the dividend by which the shares of stock were acquired was income to which the beneficiary was entitled, if the beneficiary when assenting to the allowance of the account had no knowledge of the transactions resulting in the acquisition of the shares by the trustees. *Smith v. Cotting*, 42.

In proceedings by stockholders and the directors of a trust company incorporated under the laws of this Commonwealth, comprising a declaration of a cash dividend and an issue of new stock at par to stockholders of record who were entitled thereto, which were designed "to accomplish substantially the same result as a stock dividend," it was held that, when the cash dividend was declared, the surplus out of which it was to be paid became income for the use of the stockholders, and that a trustee who subscribed for and received the new stock for the dividend was accountable to a beneficiary for the money thus received. *Ibid*.

Under the circumstances, a distribution by the trust company above described of shares of the capital stock of another trust company which it previously had purchased because "it seemed necessary to control" such other trust company "in order to prevent its conduct in a manner which might be prejudicial to the interests of the" trust company that bought it, was held not in any sense to be a partial distribution of the capital of the trust company declaring it, but to be a dividend which should be delivered to a beneficiary for life under a trust receiving it as income, and not be added to the capital of the trust fund. *Ibid*.

CARRIER.

*Of Passengers.*

Regulation by a town of the use of motor vehicles carrying passengers for hire which was held to be valid under St. 1916, c. 293. *Commonwealth v. Theberge*, 386.

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CHARITY.

Information in equity by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, to determine the beneficiaries under a certain trust deed, and particularly the relator's rights to enforce the provisions of that deed, and to remove certain trustees. *Attorney General v. Armstrong*, 196.

Provisions of a will giving the residue to the testator's wife and others as trustees with power to supply needs of the wife and of others (who died leaving the wife surviving), the remaining property to "be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose," where the widow waived the provisions for her benefit in the will and continued to live, were held to create a valid trust for charitable purposes in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries. *Coffin v. Attorney General*, 579.

It also was held that the power of appointment to designate the charities vested in the testator's widow and his daughter and could be exercised by the widow as the survivor of them and that the trustees should be ordered to distribute and pay over the residue to such charitable organizations as the widow as such survivor of the donees of the power should appoint. *Ibid.*

In the suit described above it also was held that an attempted execution by the widow of the power by deed for the benefit of a private trust was void, but that such instrument did not prevent a new appointment by the widow in conformity with the terms of the power. *Ibid.*

CHILD.

Under St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3, a child under eighteen years of age by a former husband of the widow of a deceased employee, who was a member of the employee's family at the time of his death, not being one of his next of kin, cannot receive compensation as a dependent. *Holmberg's Case*, 144.

Under the same statutes, such a child, who was not living with the deceased employee at the time of his death, is conclusively presumed to have been wholly dependent upon his father for support. *Ibid.*

And, where there are also a surviving widow and a child of her and the deceased employee, who were living with the employee at the time of his death, the compensation under the workmen's compensation act is to be awarded in equal shares to the widow and the two mentioned children of the employee,

the third part due to the child of the widow to be paid to the widow, and the third part due to the child by the former wife to be paid to his guardian. *Holmberg's Case*, 144.

## CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

## CONSPIRACY.

In an action by a building contractor against the members of a bricklayers' union for damages resulting from a conspiracy against the plaintiff and malicious interference with his business, in sending out a notice, in pursuance of a common purpose agreed upon by them in combination, that union masons would not work for the plaintiff until further notice as he "has been working Non Union Masons," the statement being false, it was held that the plaintiff was entitled to go to the jury. *Martineau v. Foley*, 220.

In the same case it also was held that the sending out of the false statement with intent to destroy the plaintiff's business was malicious within the legal meaning of that word, being without legal justification, and entitled the plaintiff to recover substantial damages from each defendant who participated in the conspiracy irrespective of the degree of his activity in the wrongful acts. *Ibid*.

## CONSTABLE.

An action of tort will not lie against a constable who, in serving an execution commanding him to put the owner in possession of certain premises occupied by the plaintiff and his family, removed the furniture, thus making it necessary for the plaintiff's wife and child to leave, and who in doing so "shut his fist and hollered and hollered" but did not come within striking distance of the plaintiff's wife and child. *Keith v. Rosnosky*, 409.

## CONSTITUTIONAL LAW.

### *Referendum.*

In making legislative provision for the apportionment of public burdens among different municipalities, although it has been the custom of the General Court usually to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, this has not always been done and it is not necessary under the Constitution. *Opinion of the Justices*, 603.

### *Government Operation of Public Utility.*

Spec. St. 1918, c. 159, providing in substance for the leasing to the Commonwealth of the road and property of the Boston Elevated Railway Company to be operated for a limited time by public officers upon the payment of a fair rent, is constitutional. *Opinion of the Justices*, 603.

A statute changing Spec. St. 1918, c. 159, by providing for a maximum fare of five cents upon the lines of the Boston Elevated Railway Company, and by



Constitutional Law (*continued*).

providing that, if the income thus received shall be inadequate to meet the cost of service, the deficiency shall be made up by payments from the treasury of the Commonwealth out of moneys to be borrowed, and that the sums so advanced shall be assessed upon the cities and towns using the service of the company, would be constitutional. *Opinion of the Justices*, 603.

A statute changing Spec. St. 1918, c. 159, by providing for reducing the fares to be charged on lines of the Boston Elevated Railway Company by the payment by the Commonwealth to that company of an amount equal to the rentals due from the company for the use of subways and for the ultimate assessment of the sums so paid by the Commonwealth upon the cities and towns using the service of the company, would be constitutional. *Ibid.*

The General Court has the right to authorize the operation of the lines of the Boston Elevated Railway Company by the Commonwealth through trustees appointed by the Governor, because the transportation of the public thus provided for is a public purpose; and there is no constitutional requirement that the operation of the lines for such a purpose by the public authorities shall be at cost or at a profit. *Ibid.*

A statute of the character described would be constitutional only after a legislative determination that the value of the private property thus devoted to a public use required such contribution from the Commonwealth in addition to all other sources of income in order that the owners of the property might receive a fair return. *Ibid.*

Such a legislative determination was made by Spec. St. 1918, c. 159, §§ 5, 6, in fixing the "dividends" to be paid upon the shares of the Boston Elevated Railway Company. *Ibid.*

*Police Power.*

The Commonwealth, which has power to regulate the use of the State highways, can delegate the administration of such powers to cities and towns which under St. 1917, c. 344, Part I, §§ 17, 21, contribute toward the repair and maintenance of the State highways and are given police jurisdiction over them. *Commonwealth v. Theberge*, 386.

St. 1912, c. 706, as amended, creating the minimum wage commission and defining its powers, is constitutional. *Holcombe v. Creamer*, 99.

*Secrecy of Grand Jury Proceedings.*

An indictment found and returned by a grand jury upon testimony given before them by witnesses in the presence of other witnesses is a violation of art. 12 of the Declaration of Rights, although no person not a member of the grand jury was present while that body was deliberating upon the evidence presented. *Commonwealth v. Harris*, 584.

*Due Process of Law.*

No federal question was raised when this case was a second time before this court and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Duane v. Merchants Legal Stamp Co.* 113.

*Equal Protection of Laws.*

No federal question was raised when this case was a second time before this court and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Duane v. Merchants Legal Stamp Co.* 113.

*War Measure.*

There is no question of the constitutionality of U. S. St. 1918, c. 20, called the soldiers' and sailors' civil relief act, it being a war measure within the power of Congress and therefore the supreme law of the land governing the foreclosure of mortgages of real estate within the territorial limits of the Commonwealth. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

*Exclusive Jurisdiction of Maritime Matters.*

A longshoreman, who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters, has received a maritime injury in maritime work and, under the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the provisions of the workmen's compensation act do not apply to him. *Duart v. Simmons*, 313.

## CONTRACT.

*What constitutes.*

A steel contractor, who under a contract with a builder furnished to the builder the structural steel required for a building to be constructed by the builder under a contract with a boiler company, upon the builder becoming bankrupt, was held not entitled to maintain a suit in equity against the boiler company and the trustee in bankruptcy of the builder, seeking to have the boiler company ordered to pay the plaintiff for the structural steel furnished for the building instead of paying the contract price to the trustee in bankruptcy of the builder, even if it was agreed between the boiler company and the builder that the boiler company as principal should pay all bills for materials furnished by subcontractors, that being a promise made for the steel contractor's benefit to another person, from whom alone the consideration moved and who was not his agent. *New England Structural Co. v. James Russell Boiler Works Co.* 274.

On the evidence at the trial of an action for the price of five tons of coal, where the defendant testified that he bought the coal from a person other than the plaintiff and paid for it by crediting the price as part of the purchase money for a motor cycle which he delivered to such person under a contract of conditional sale, it was held that the judge properly refused to rule that, "There is no evidence on which the jury can find that [the third person] was authorized as the plaintiff's agent to purchase any motor cycle with title to be conferred upon said [third person] at the time of the purchase." *Farnum v. Ramsey*, 286.

In an action of contract for the price of coal alleged to have been sold by the plaintiff to the defendant, which the defendant testified that he bought

Contract (*continued*).

from a third person individually, although such person was alleged by the plaintiff to have been his agent, where the jury found for the defendant, it was held that the plaintiff was not aggrieved by a refusal of the judge at the trial to rule, that, if the defendant used the coal after notice from the plaintiff that the coal was his and not the third person's or if the circumstances ought to have led the defendant to believe that it was the plaintiff's coal, the defendant was liable. *Farnum v. Ramsey*, 286.

In a petition by certain laborers to compel certain city officers to approve of the payment of an increase in wages in accordance with a vote of the city council which was void because in violation of the municipal indebtedness act, it was said that, as the petition must be dismissed, it was not necessary to consider whether, if the petitioners had been entitled to the wages claimed by them, they could have sued for such wages in actions of contract so that they would not have needed, nor have been entitled to, the writ of mandamus sought. *Shannon v. Mayor of Cambridge*, 322.

An agreement in writing under seal between a mortgagee of real estate and a grantee of the mortgagor, who by the terms of his deed agreed to assume and pay the mortgage, providing for an extension of the mortgage debt, if signed by both in duplicate, and acknowledged by the mortgagee on the duplicate original intended for the grantee, but not acknowledged by the grantee on the duplicate original intended for the mortgagee, where there was no condition that the instrument should take effect only on acknowledgment by the grantee, can be found to have been executed by both parties and to have gone into effect upon its execution. *Codman v. Deland*, 344.

In an action for work, labor and materials performed and furnished on a building, where the statute of frauds is pleaded and the defence set up is that the work was performed for a corporation which occupied the building, and that the promise sued upon was an oral promise to pay the debt of another, it was held that the judge correctly instructed the jury that the plaintiff could recover only upon the theory that the defendant in the first instance agreed to pay for the work, that he bound himself to pay for it directly and that his obligation was not that of a guarantor. *Alexander v. Dove*, 362.

Certain statements by a third person to a building contractor working on a building occupied by a corporation which, it was held in an action against this person by the contractor, could be found to constitute a direct agreement by the defendant to pay for the work which was not a promise to pay the debt of another. *Ibid.*

Conduct and statements of a stockholder in the corporation which occupied the building above described, which, it was held, constituted evidence warranting the submission to the jury of the question whether the stockholder made a direct agreement to pay for the work which was not a promise to pay the debt of another. *Ibid.*

Where work had been done on a building occupied by a corporation, a statement by a minority stockholder in the corporation, who held no office in it, that "he would see that the bill was paid," is not evidence of a new and independent agreement of the stockholder to pay the bill, and, if it were, such agreement would be without consideration. *Ibid.*

In an action against individuals for a broker's commission, it was held that the fact, that the property for which the plaintiff procured a purchaser be-

longed to a corporation of which all the stock was owned by the principal defendant, his sister and his father, did not necessarily make the employment of the plaintiff to procure a sale of the property an employment by the corporation, there being evidence that the principal defendant personally employed the plaintiff to find a purchaser for the property. *Johnstone v. Cochrane*, 472.

In the case above described the second defendant was the sister of the principal defendant and was one of the three holders of all the stock of the corporation, but there was no evidence that she employed the plaintiff or that the principal defendant was authorized to employ him in her behalf, and it was held that a verdict should be ordered in her favor, the fact that she derived benefit from her brother's employment of the plaintiff being no evidence of her liability. *Ibid*.

Where, at the trial of an action by a corporation for the breach of an alleged contract in writing to sell and deliver to the plaintiff a Packard motor truck, the contract, when offered in evidence at the trial, had written below the signature of the plaintiff's president these words: "Not valid unless countersigned by an executive of the Packard Motor Car Co. of Boston," and was not so countersigned, and the plaintiff's president testified that when the contract was signed he "did not see anything [the requirement above quoted] there and didn't know whether they were there or not," it was held that the plaintiff was entitled to go to the jury, who might refuse to believe testimony of the defendant's salesman to the effect that there had been no change in the contract. *William J. McCarthy Co. v. Fuller*, 495.

In the case above described it was said that, in view of the decision stated above, it was unnecessary to consider whether there was evidence that the requirement of the signature of an executive officer was waived by the defendant. *Ibid*.

The board of aldermen of a city, in granting to a street railway corporation under the authority given by St. 1874, c. 29, § 11, Pub. Sts. c. 113, § 21, an extension of the location of its tracks in that city and imposing a certain condition as to repair of such portions of the streets, roads and bridges, respectively, as are occupied by its tracks were to act as public officers and not as agents of the city, so that the acceptance of the location by the street railway corporation did not constitute a contract of the corporation with the city that it would comply with the conditions of the grant. *Northampton v. Northampton Street Railway*, 540.

#### Consideration.

In an action on an agreement in writing to pay to the plaintiff the balance remaining unpaid on a promissory note, given to the plaintiff by a bankrupt corporation, after "a dividend" is paid on such note, where there was evidence that the plaintiff held the promissory note of the defendant which, at the request of the defendant, he surrendered and received instead the promissory note of the corporation, it was held on the evidence that the contract was a valid one, the consideration for the defendant's promise being the surrender by the plaintiff of the defendant's note in exchange for the note of the corporation, and that the plaintiff was entitled to go to the jury. *Timson v. Parrott*, 567.

*Validity.*

Certain non-negotiable note, with an indorsement by the maker, "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's . . . estate," was held to be valid. *McQuesten v. Spalding*, 301.

A contract to pay a man \$60 a week for delivering beer sold in part in Boston, where such sale was lawful, and sold in part in Brookline, where such sale was unlawful, is wholly void, a single consideration being paid for the lawful and the unlawful services. *Boylston Bottling Co. v. O'Neill*, 498.

The surety on a bond, which was given to ensure the faithful performance of an unlawful contract, cannot be held liable for a breach of the bond by the principal, because the courts will not enforce the obligation of an unlawful contract. *Ibid.*

At the trial of an action, in which the validity of the contract of employment of a driver for a liquor dealer under a fourth class license was involved, it was assumed by the parties that certain sales of the packages of liquor procured by the driver for his employer from a brewery and labelled by him for delivery to customers of his employer in Boston were lawful, but it was said that this assumption was wrong, as the license authorized a sale on the premises described in it and the premises described in the dealer's fourth class license were its place of business owned by it; and on the facts stated above it did not appear that the sales in Boston were made on the premises of the dealer described in its license. *Ibid.*

No action can be maintained between the parties to a promissory note which was given pursuant to the provisions of an unlawful contract. *Moss v. Copelof*, 513.

Upon the evidence at the trial of an action of contract on certain promissory notes, where the defence was set up that the notes were void because given in pursuance of an unlawful agreement, it appeared that the notes were given by the two defendants to the plaintiff in pursuance of a contract in writing between the three, and it was held wrong to order a verdict for the plaintiff, because the jury could have found that the contract between the parties was to pay the plaintiff \$600 from the funds of a corporation, when nothing was due to him, and to apply this amount on account of his indebtedness "for unpaid stock subscription," which would make the contract unlawful and void and in violation of St. 1903, c. 437, § 14. *Ibid.*

Upon the evidence at the trial of an action upon a contract for the installation of an irrigation system in which the defendant alleged in defence that the contract was void because made on the Lord's day, where it appeared that an oral agreement was made on a Sunday and that on the next day the plaintiff's agent wrote to the defendant a letter beginning, "We wish to confirm agreement which we reached yesterday," and that the plaintiff in good faith went forward with the installation of the plant, doing all the work on secular days, it was held that a finding was warranted that the installation was done under a contract made on Monday. *Skinner Irrigation Co. v. Burke*, 555.

It also was held that an inspection and test performed by the plaintiff on a Sunday after the work was completed did not affect the plaintiff's right to recover. *Ibid.*

It also was held proper to refuse to grant a request for a ruling that "The offer contained in the letter of the plaintiff to the defendant of . . . [Monday] . . . not having been accepted by the defendant only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover." *Skinner Irrigation Co. v. Burke*, 555.

In an action on an agreement in writing to pay to the plaintiff the balance remaining unpaid on a promissory note, given to the plaintiff by a bankrupt corporation, after "a dividend" is paid on such note, where there was evidence that the plaintiff held the promissory note of the defendant, which, at the request of the defendant, he surrendered and received instead the promissory note of the corporation, it was held on the evidence that the contract was a valid one, the consideration for the defendant's promise being the surrender by the plaintiff of the defendant's note in exchange for the note of the corporation, and that the plaintiff was entitled to go to the jury. *Timson v. Parrott*, 567.

#### Construction.

Upon the construction of an accepted order in writing for the purchase of a motor hearse it was held that, after the buyer made two payments of \$250 each, and the seller failed to deliver the motor hearse within the time required by the contract, whereupon the buyer rescinded the contract, cancelling his order and demanding back the \$500 paid by him, the defendant could not successfully contend that the plaintiff was entitled to recover only \$250, the \$250 first paid having been forfeited under the terms of the contract, but that the plaintiff was entitled to recover the whole amount of \$500 paid by him, the consideration for which had failed. *Martin v. James Cunningham, Son & Co.* 280.

A provision in a contract in writing for the purchase of machinery, that the seller should furnish and deliver the machinery to the purchaser "within four weeks after approval of drawings" at a price named, and that payments were "to be made in four months' notes bearing interest at 6% — notes to be secured by Purchasers' bonds held by and guaranteed by" a certain corporation, was held not to constitute a representation that, at the time when the contract was made, there were bonds of the purchaser held by and guaranteed by the corporation designated, but constituted a promise that, when the notes of the purchaser were issued, such bonds would be ready for delivery as security. *Wheeler Condenser & Engineering Co. v. Libby*, 561.

Construction of lease of land, see appropriate subtitle under LANDLORD AND TENANT.

#### Performance and Breach.

A steel contractor, who under a contract with a builder furnished to the builder the structural steel required for a building to be constructed by the builder under a contract with a boiler company, upon the builder becoming bankrupt, was held not entitled to maintain a suit in equity against the boiler company and the trustee in bankruptcy of the builder, seeking to have the boiler company ordered to pay the plaintiff for the structural steel furnished for the building instead of paying the contract price to the trustee in bankruptcy of the builder, even if it was agreed between the boiler company and the builder that the boiler company as principal should pay all

Contract (*continued*).

bills for materials furnished by subcontractors, that being a promise made for the steel company's benefit to another person, from whom alone the consideration moved and who was not his agent. *New England Structural Co. v. James Russell Boiler Works Co.* 274.

Construction of a covenant of the lessor in a lease of one of several stores in a building of the lessor, that during the term of the lease she would not rent any part of the building on premises in which the stores were located for any grocery, provision, meat or fish business, "except the Cloverdale Store now located at No. 431 Park Avenue," was held to have been broken when, upon the vacating of 431 Park Avenue, the lessor executed a lease of that store to another corporation for the sale of provisions, meats, groceries and fish. *Strates v. Keniry*, 426.

In an action in the Superior Court for alleged breach of a contract in writing to employ the plaintiff as a salesman for one year at a salary payable weekly and further compensation at the end of the term, the defendant set up the alleged defence that the plaintiff broke his contract and that the defendant discharged him rightly for that reason, but it was held that this issue was *res judicata* against the defendant by a judgment of the Municipal Court of the City of Boston in favor of the plaintiff in an action upon an account annexed, the first three items being for weekly instalments of salary, wherein the judge of the Municipal Court had found that the plaintiff was discharged by the defendant without justification. *Dalton v. American Ammonia Co.* 430.

Damages to be assessed for breaches of contracts, see appropriate subtitle under DAMAGES.

#### *Ratification.*

Whether a surety on a bond for the faithful performance of a contract between a landowner and a building contractor can be held under any circumstances to have ratified a further contract made between the landowner and the contractor for their own benefit and convenience, or whether the principle of ratification has no application to such a case, here was mentioned as a question which it was unnecessary to pass upon because there was no evidence of the necessary elements of a ratification. *Schwartz v. American Surety Co. of New York*, 490.

#### *Rescission.*

Upon the construction of an accepted order in writing for the purchase of a motor hearse it was held that, after the buyer made two payments of \$250 each, and the seller failed to deliver the motor hearse within the time required by the contract, whereupon the buyer rescinded the contract, cancelling his order and demanding back the \$500 paid by him, the defendant could not successfully contend that the plaintiff was entitled to recover only \$250, the \$250 first paid having been forfeited under the terms of the contract, but that the plaintiff was entitled to recover the whole amount of \$500 paid by him, the consideration for which had failed. *Martin v. James Cunningham, Son & Co.* 280.

#### *In Writing.*

It was held that, by reason of a covenant in a bill of sale in writing and under seal of the good will of a garage and its equipment, in the absence of fraud

inducing the sale, the purchaser could not maintain an action of contract against the seller for breach of an oral warranty as to the cost of the equipment purchased. *Carpenter v. Sugden*, 1.

Where the buyer under a contract in writing for the conditional sale of chattels after a partial payment of instalments of the purchase money makes default and the seller takes possession of the chattels under the terms of the contract, the seller cannot maintain an action against the buyer to recover the value of the buyer's use of the chattels while in his possession in excess of the payments made by him, the rights of the parties being defined by their express contract in writing and there being no basis for such an implied contract to pay for the use of the chattels. *Schmidt v. Ackert*, 330.

Where, at the trial of an action by a corporation for the breach of an alleged contract in writing to sell and deliver to the plaintiff a Packard motor truck, the contract, when offered in evidence at the trial, had written below the signature of the plaintiff's president these words: "Not valid unless countersigned by an executive of the Packard Motor Car Co. of Boston," and was not so countersigned, and the plaintiff's president testified that when the contract was signed he "did not see anything [the requirement above quoted] there and didn't know whether they were there or not," it was held that the plaintiff was entitled to go to the jury, who might refuse to believe testimony of the defendant's salesman to the effect that there had been no change in the contract. *William J. McCarthy Co. v. Fuller*, 495.

### *Implied.*

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J., dissenting. Friend v. Childs Dining Hall Co.* 65.

In an action of contract against a restaurant keeper for furnishing food to the plaintiff to be eaten on the premises which was not fit to eat, it was said that, assuming that the provision of the sales act contained in St. 1908, c. 237, § 15 (3), applied to such an action, and that, contrary to the circumstances of the case, it was the plaintiff's duty to examine the food before eating it, it would be a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered. *Ibid.*

Upon the construction of an accepted order in writing for the purchase of a motor hearse it was held that, after the buyer made two payments of \$250 each and the seller failed to deliver the motor hearse within the time required by the contract, whereupon the buyer rescinded the contract, cancelling his order and demanding back the \$500 paid by him, the defendant could not successfully contend that the plaintiff was entitled to recover only \$250, the \$250 first paid having been forfeited under the terms of the contract, but that the plaintiff was entitled to recover the whole amount of \$500 paid by him, the consideration for which had failed. *Martin v. James Cunningham, Son & Co.* 280.

Where the buyer under a contract in writing for the conditional sale of chattels after a partial payment of instalments of the purchase money makes default



*Contract (continued).*

and the seller takes possession of the chattels under the terms of the contract, the seller cannot maintain an action against the buyer to recover the value of the buyer's use of the chattels while in his possession in excess of the payments made by him, the rights of the parties being defined by their express contract in writing and there being no basis for such an implied contract to pay for the use of the chattels. *Schmidt v. Ackert*, 330.

*Statute of Frauds.*

The defence that an oral contract for a sale of land or an interest therein or an oral trust concerning land is within the statute of frauds under R. L. c. 74, § 1, cl. 4, or R. L. c. 147, § 1, cannot be set up by a third person, the statute of frauds being a defence only to the parties to the contract, which they are not obliged to set up unless they choose to do so. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

*Negligence of Plaintiff.*

In an action of contract against a restaurant keeper for furnishing food to the plaintiff to be eaten on the premises which was not fit to eat, it was said that, assuming that the provision of the sales act contained in St. 1908, c. 237, § 15 (3), applied to such an action, and that, contrary to the circumstances of the case, it was the plaintiff's duty to examine the food before eating it, it would be a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered. *Friend v. Childs Dining Hall Co.* 65.

*Of Employment.*

Invalid contract of employment to transport intoxicating liquors. *Boylston Brewing Co. v. O'Neill*, 498.

*Of Conditional Sale.*

See SALE, CONDITIONAL.

## CONVERSION.

Where a mortgage of chattels provided that the mortgagor in case of foreclosure should be notified in the manner provided by R. L. c. 198, § 5, "of the time and place of any such sale to be made in foreclosure proceedings, at least seven days before such sale," it was held that a notice of a sale to be on July 10, published June 30, July 2 and July 9, the sale on July 10 being continued to July 13 and then made, was sufficient and that the sale was valid, so that the mortgagor could not maintain an action of conversion against the auctioneer. *Freed v. Rosenthal*, 357.

Where, at the trial of an action for the conversion of a boat, the only evidence was that during the night of June 16 "said boat was taken away by some person," and from June 20 to August 31 "was in the possession of the defendant," when at the plaintiff's request the defendant delivered it to him,

and that the defendant had made changes which required a substantial outlay by the plaintiff to restore the boat to its former condition and which, even when it was so restored, had greatly depreciated its value, no justification of the intermeddling by the defendant was shown and a finding that the defendant converted the boat to his own use was warranted. *Jackson v. Innes*, 558.

In the action above described it also appeared that the boat was designed and built as a pleasure boat for use by the plaintiff during the spring and fall and for letting during the summer, that the plaintiff had done nothing toward letting the boat during the summer because it was out of his possession, and that the defendant had derived no income from it; and it was held that, the plaintiff being entitled to full compensation for all damage suffered by him through the conversion, might recover for the loss of the use of the boat during the period of detention as well as the expense to which he was put in restoring it to the condition in which it was when taken by the defendant. *Ibid*.

At the trial of the action above described, it was error to permit a witness, other than the plaintiff, to testify as to the fair market value of the use of the boat during the period of detention without its being shown that such witness had any general experience or qualification which would make his opinion admissible. *Ibid*.

## CORPORATION.

### *Officers and Agents.*

An alleged authorization by the president of the corporation of fraudulent forging and alteration of the receipts of a bank by the treasurer could not affect the character of the acts, because no such authority could be given. *Commonwealth v. Peakes*, 449.

Where in a bill of exceptions in an action of contract it was stated as a material fact, that the plaintiff was elected president of a Massachusetts business corporation, it was taken, in the absence of any statement to the contrary, that the plaintiff was elected as such president under St. 1903, c. 437, § 18, and therefore that he was elected for the term of one year. *Moss v. Copeland*, 513.

Upon the evidence at the trial of an action of contract on certain promissory notes, where the defence was set up that the notes were void because given in pursuance of an unlawful agreement, it appeared that the notes were given by the two defendants to the plaintiff in pursuance of a contract in writing between the three, and it was held wrong to order a verdict for the plaintiff, because the jury could have found that the contract between the parties was to pay the plaintiff \$600 from the funds of the corporation, when nothing was due to him, and to apply the amount on account of his indebtedness "for unpaid stock subscription," which would make the contract unlawful and void and in violation of St. 1903, c. 437, § 14. *Ibid*.

Additional facts, which appeared at a new trial, after exceptions taken at the first trial had been sustained, of an action against a corporation by the administrator of the estate of a deceased injured employee who also was his alleged dependent, upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the

Corporation (*continued*).

defendant for that purpose, it was held, did not show that the members of a committee, who had power to determine the plaintiff's claim, were not employees of the company and fellow employees of the plaintiff's intestate and did not show that the committee was constituted unlawfully, that its members were parties in interest or that they acted in bad faith; and consequently it was further held that the plaintiff was not entitled to go to the jury at the new trial. *Clark v. New England Telephone & Telegraph Co.* 546.

### *Corporate Liability for Acts of Stockholders.*

In an action against individuals for a broker's commission, it was held that the fact that the property for which the plaintiff procured a purchaser belonged to a corporation, of which all the stock was owned by the principal defendant, his sister and his father, did not necessarily make the employment of the plaintiff to procure a sale of the property an employment by the corporation, there being evidence that the principal defendant personally employed the plaintiff to find a purchaser for the property. *Johnstone v. Cockrane*, 472.

### *Suit in Equity by Stockholder.*

In a suit in equity by one of the stockholders of a trading stamp corporation, which had conducted a monopolistic business in violation of St. 1908, c. 454, against the corporation and the other parties to the enterprise, it was said that, "The theory of the law is that general morality and business integrity are best promoted by not undertaking to aid repentant participants in executed illegal transactions" and by leaving them without remedy against one another. *Duane v. Merchants Legal Stamp Co.* 113.

No federal question was raised when this case was a second time before this court and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Ibid.*

*Duane v. Merchants Legal Stamp Co.* 227 Mass. 466, affirmed and declared not to be distinguishable from *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393. *Ibid.*

A suit in equity by stockholders in a corporation to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by a proper vote of the directors cannot be maintained without alleging and proving that the plaintiffs first sought in vain to obtain relief through a suit brought by the corporation itself or alleging and proving a valid excuse for not doing so. *Soghomonian v. Garabedian*, 445.

A judgment creditor of a corporation, who also was a stockholder, cannot maintain a suit in equity to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by a valid vote of the directors, where it appears that the plaintiff had full cognizance of and acquiesced in the execution of the mortgages in controversy and also that he obtained his judgment by misleading the officers of the corporation and preventing them from contesting the action in which he obtained it. *Ibid.*

*Dividend.*

Under the circumstances, a distribution by a trust company of shares of the capital stock of another trust company which it previously had purchased because "it seemed necessary to control" such other trust company "in order to prevent its conduct in a manner which might be prejudicial to the interests of the" trust company that bought it, was held not in any sense to be a partial distribution of the capital of the trust company declaring it, but to be a dividend which should be delivered to a beneficiary for life under a trust receiving it as income, and not be added to the capital of the trust fund. *Smith v. Cotting*, 42.

In proceedings by stockholders and the directors of a trust company incorporated under the laws of this Commonwealth, comprising a declaration of a cash dividend and an issue of new stock at par to stockholders of record who were entitled thereto, which were designed "to accomplish substantially the same result as a stock dividend," it was held that, when the cash dividend was declared, the surplus out of which it was to be paid became income for the use of the stockholders, and that a trustee who subscribed for and received the new stock for the dividend was accountable to a beneficiary for the money thus received. *Ibid.*

*Transfer of Shares.*

In a suit in equity to enforce an alleged right of the plaintiff to have made to him a transfer of certain shares of mining stock, the defendant relied on a transfer of the beneficial interest in the shares purporting to be made by a business associate of the plaintiff under the authority contained in a power of attorney executed by the plaintiff, and it was held that, on all the evidence, a finding of the trial judge, that under the power of attorney the transfer in question was authorized, not only was not plainly wrong but that it was supported fully by the evidence, and that the bill should be dismissed. *Warner v. Brown*, 333.

In the suit in equity above described it was said that, even if the person to whom the power of attorney was given had been false to the plaintiff and had violated his duty toward him, that would not have affected the defendants if they had no knowledge of it and acted as reasonable men in good faith in relying upon the terms written in the power of attorney. *Ibid.*

*Taxation.*

See appropriate subtitle under TAX.

*Fund for Injured Employees and Dependents.*

Additional facts, which appeared at a new trial, after exceptions taken at a first trial had been sustained, of an action against a corporation, by the administrator of the estate of a deceased injured employee who also was his alleged dependent, upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it was held, did not show that the members

*Corporation (continued).*

of a committee, who had power to determine the plaintiff's claim, were not employees of the company and fellow employees of the plaintiff's intestate and did not show that the committee was constituted unlawfully, that its members were parties in interest or that they acted in bad faith, and consequently it was further held that the plaintiff was not entitled to go to the jury at the new trial. *Clark v. New England Telephone & Telegraph Co.* 546.

*Public Service Corporation.*

Constitutionality of Spec. St. 1918, c. 159, and of certain proposed legislation providing in substance for the temporary operation, by trustees appointed by the Governor, of the lines of the Boston Elevated Railway Company and the payment of deficiencies thereby arising and of dividends to stockholders by taxation and assessments upon municipalities chiefly interested. *Opinion of the Justices*, 603.

*Banking Corporations.*

See TRUST COMPANY.

*Municipal Corporations.*

See that title.

## COVENANT.

It was pointed out that, at the trial of an action against one of two joint tortfeasors, the defendant might show that although a covenant not to sue between the plaintiff and the other joint tortfeasor recited that it did not release the plaintiff's claim against the defendant, the plaintiff really had released and discharged all claims against the other joint tortfeasors. *O'Neil v. National Oil Co.* 20.

Under the circumstances in the same case where the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner for the covenant not to sue in mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *Ibid.*

Construction of a certain covenant in a lease, see *Strates v. Keniry*, 426.

## DAMAGES.

*For Property taken or damaged under Statutory Authority.*

A statement in an agreed statement of facts presented to this court in a report of a petition for the assessment of damages caused by the repair of a public way by a city, that in a previous proceeding for the assessment of the same damages "a certain notice" which it was necessary that the petitioner should give to the mayor and aldermen "was insufficient," was construed to refer to the omission to file with the mayor and aldermen a "petition for compensation," which by R. L. c. 51, §§ 15, 16, is a necessary preliminary to a petition for the assessment of the damages by a jury. *Warner v. Pittsfield*, 138.

A plea in abatement to a petition for an assessment of damages caused by the repair of a public way based on the pendency of an earlier petition for the same damages must be overruled, where it appears that in the previous proceedings a verdict was returned for the respondent with leave to the petitioner to present exceptions to this court, that no exceptions ever were filed and that judgment was entered for the respondent so that the earlier petition was not pending when the second one was brought. *Warner v. Pittsfield*, 138.

An order of the Superior Court dismissing a petition under R. L. c. 51, §§ 15, 16, for the assessment of damages caused to the petitioner's land by repairs upon a public way on which the land abuts, made on the ground that no petition for compensation had been filed with the mayor and aldermen "after the commencement and within one year after the completion of the work" which caused the alleged damage, as required by the statute, is not a bar to a new petition for damages to the petitioner's land caused by the same repairs, which is filed after a compliance with the requirements of the statute. *Ibid.*

A claim of a landowner against a town for damages for the taking of an easement in his land for the construction of a sewer is a chose in action which does not pass by a deed of the land. *Howland v. Greenfield*, 147.

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, was held to constitute a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Ibid.*

#### *For Breach of Contract.*

Extent of recovery by a city in an action against a street railway corporation upon a bond, given in compliance with a condition imposed by the grant of an extension of location made to it by the aldermen of the city, as it related to the cost of maintenance of certain bridges. *Northampton v. Northampton Street Railway*, 540.

#### *In Tort.*

If, by reason of smoke, soot, cinders and noxious odors emitted unnecessarily and unreasonably by locomotives upon an adjacent railroad, the proprietor of a hotel is unable to use a dining room in the hotel nearest the railroad, and permanently removes it to another part of the building, in an action against the railroad company for damage caused by its wrongful acts he cannot recover for the expense of the permanent change of the dining room because the wrongful conduct of the defendant was of a temporary nature; but the effect of the conduct of the defendant upon the use of the dining room should be considered as an element to be included in the diminished rental value of the premises, for which the plaintiff is entitled to be compensated. *Matthews v. New York Central & Hudson River Railroad*, 10.

Part of the property alleged in the action above described to have been damaged was a hotel. The defendant introduced evidence showing the gross receipts of the hotel during a certain period. Subject to an exception by the

*Damages (continued).*

defendant, the plaintiff was allowed to read a column of payments for taxes and other matters, as prepared by the defendant's expert. Later the entire paper was put in evidence without objection, and it was held that the exception must be overruled. *Matthews v. New York Central & Hudson River Railroad*, 10.

In the same action the plaintiff was held to be entitled to recover for damage done to the outer walls of his building as a direct result of the defendant's wrongful emission of smoke and soot upon such walls. *Ibid.*

At the trial of an action of tort against the New York Central and Hudson River Railroad Company for damages caused to property of the plaintiff adjacent to the railroad in Boston by unreasonable and unnecessary excess of smoke, soot and cinders from the defendant's locomotives, it is proper to exclude as immaterial questions asked of the plaintiff in cross-examination as to his applying during the period of the alleged wrongful acts of the defendant for an abatement of taxes on other properties belonging to him on different streets not nearer than a quarter of a mile to the property in question and not affected by the railroad. *Ibid.*

At the trial of the action above described, by reason of a question asked by the defendant of a witness in cross-examination, it was held proper for the witness to testify on redirect examination that in one of the years covered by the action he had observed about one hundred engines on the New York, New Haven, and Hartford railroad in the vicinity of Cumberland and Durham streets. *Ibid.*

At the trial of the action above described, the judge submitted to the jury four questions calling for the assessment of damages as to four distinct elements. Upon the return of their answers, he ordered them to return a general verdict for the plaintiff which included the sums found by them in answer to the last two questions, but, subject to exceptions by the plaintiff, excluded the sums found in answer to the first two questions. This court held that the damages found in answer to the first question should have been included in the general verdict. It appeared that there was evidence warranting that answer, and it further was held that it was unnecessary to order a new trial of that single question of damage, but that the amount found in answer to the first question should be added to the general verdict and that judgment should be entered accordingly. *Ibid.*

In an action against one of two joint tortfeasors, where the plaintiff had received \$1,500 from the other tortfeasor and had given him a covenant not to sue, and the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *O'Neil v. National Oil Co.* 20.

In an action against a labor union for unlawful interference with the plaintiff's business in sending out a notice that union masons would not work for the plaintiff because he had "been working Non Union Masons," it was held that the sending out of the false statement with intent to destroy the plaintiff's business was malicious within the legal meaning of that word, being without legal justification, and entitled the plaintiff to recover substantial damages from each defendant who participated in the conspiracy

irrespective of the degree of his activity in the wrongful acts. *Martineau v. Foley*, 220.

In an action for personal injuries caused by the negligence of the defendant in knocking down the plaintiff with a motor car and breaking his leg, it was held that evidence that when the plaintiff at a hospital was attempting to get out of a wheel chair one of his crutches slipped and he fell back into the chair, breaking the same bone at the place of the original fracture, was admitted properly, as the jury could find that the second fracture was a natural and proximate result of the first injury. *Hartnett v. Tripp*, 382.

In an action against a surgeon for damages resulting from the defendant's negligence in operating upon the plaintiff on the wrong side for a rupture caused by an accident for which a railroad corporation was liable, it was said that it was unnecessary to consider, whether the railroad corporation would have been liable for the aggravation of the plaintiff's injury caused by the defendant's mistake in operating on the wrong side if there had been no mistake in regard to the identity of the patient. *Purchase v. Seelye*, 434.

In an action for the conversion of a boat, it appeared that the boat was designed and built as a pleasure boat for use by the plaintiff during the spring and fall and for letting during the summer, that the plaintiff had done nothing toward letting the boat during the summer because it was out of his possession, and that the defendant had derived no income from it; and it was held that, the plaintiff being entitled to full compensation for all damage suffered by him through the conversion, might recover for the loss of the use of the boat during the period of detention as well as the expense to which he was put in restoring it to the condition in which it was when taken by the defendant. *Jackson v. Innes*, 558.

At the trial of the action above described, it was error to permit a witness, other than the plaintiff, to testify as to the fair market value of the use of the boat during the period of detention without its being shown that such witness had any general experience or qualification which would make his opinion admissible. *Ibid.*

#### *In Suit in Equity.*

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, where it appeared that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, it was held that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the authorized diversion of the water. *Isbell v. Greylock Mills*, 233.

#### *Mitigation.*

In an action against one of two joint tortfeasors, where the plaintiff had received \$1,500 from the other tortfeasor and had given him a covenant not to sue, and the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages,



Damages (*continued*).

was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *O'Neil v. National Oil Co.* 20.

*Part Satisfaction by Co-tortfeasor.*

In an action against one of two joint tortfeasors, where the plaintiff had received \$1,500 from the other tortfeasor and had given him a covenant not to sue, and the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *O'Neil v. National Oil Co.* 20.

DEATH.

In a claim under the workmen's compensation act by the dependent of an employee, who was found dead with his throat cut by a dangerous machine on which he worked and into which he had fallen, the burden of proof is upon the dependent to show that the employee was alive when he fell into the machine. *Dow's Case*, 348.

Application of the foregoing principle in a claim by the dependent of a boy nineteen years of age, who, when employed as a tender of a beaming machine, fell into it, where the Industrial Accident Board found that "evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time," and awarded compensation to the dependent, it being held that this court could not say as matter of law that the conclusion of the board was unsupported by the evidence. *Ibid.*

In the same case it was contended by the insurer that, assuming that the employee was alive when he struck the machine, the cause of his fall was the proximate cause of his death and that the cause of his fall was unknown or conjectural, but it was held that the cause of his fall was the remote cause and that the fall itself was the dominant and proximate cause of the injury that resulted in death. *Ibid.*

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death*.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

DECEIT.

A provision in a contract in writing for the purchase of machinery, that the seller should furnish and deliver the machinery to the purchaser "within four weeks after approval of drawings" at a price named, and that payments were "to be made in four months' notes bearing interest at 6% — notes to be secured by Purchasers' bonds held by and guaranteed by" a certain corporation, was held not to constitute a representation that, at the time when the contract was made, there were bonds of the purchaser held by and guaranteed by the corporation designated. *Wheeler Condenser & Engineering Co. v. Libby*, 561.

It therefore further was held that, the contract containing no representation of the existence of such bonds at the time when it was made, an action for deceit

could not be maintained against one who signed the contract on behalf of the purchaser, based on the allegation that when the contract was signed the bonds were not in existence. *Wheeler Condenser & Engineering Co. v. Libby*, 561.

### DEED.

A claim of a landowner against a town for damages for the taking of an easement in his land for the construction of a sewer is a chose in action which does not pass by a deed of the land. *Howland v. Greenfield*, 147.

In the interpretation of a deed a significant word used according to the common and approved usage of the language, which is repeated in the same clause of the instrument, is to be understood to have been used the second time in the same rather than in a different sense. *Attorney General v. Armstrong*, 196.

In this Commonwealth, where the grantee in a deed assumes and agrees to pay a mortgage on the property conveyed, he becomes as between himself and his grantor the principal debtor for the payment of the mortgage debt assumed by him, and the mortgagor as to the grantee becomes a surety, although this does not bind the mortgagee unless he assents to it. *Codman v. Deland*, 344.

But, if thereafter the mortgagee, without the assent or knowledge of the mortgagor, makes an agreement in writing under seal with the grantee extending the time of payment of the mortgage note at an increased rate of interest, the mortgagee by such agreement accepts the grantee as the principal debtor and the mortgagor as a surety and, by the agreement to extend the time of payment contained in the same instrument, made without the knowledge of the mortgagor, discharges the mortgagor from his liability as surety. *Ibid.*

An agreement in writing under seal between a mortgagee of real estate and a grantee of the mortgagor, who by the terms of his deed agreed to assume and pay the mortgage, providing for an extension of the mortgage debt, if signed by both in duplicate, and acknowledged by the mortgagee on the duplicate original intended for the grantee, but not acknowledged by the grantee on the duplicate original intended for the mortgagee, where there was no condition that the instrument should take effect only on acknowledgment by the grantee, can be found to have been executed by both parties and to have gone into effect upon its execution. *Ibid.*

### DEVISE AND LEGACY.

#### Power.

A widow, whose husband had devised and bequeathed to her all his property "for her natural life, with power to sell or mortgage said property if she considers it necessary," leaving the remainder to his children upon her death, was held thereby to have power to make a lease of certain real estate that had belonged to her husband, so that the tenant might maintain a suit in equity against the children of the testator to enjoin them from interfering with his quiet enjoyment of the property. *Wolff v. O'Brien*, 487.

Provisions of a will giving the residue to the testator's wife and others as trustees with power to supply needs of the wife and of others (who died leaving the wife surviving), the remaining property to "be devoted to

Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose," where the widow waived the provisions for her benefit in the will and continued to live, were held to create a valid trust for charitable purposes in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries. *Coffin v. Attorney General*, 579.

It also was held that the power of appointment to designate the charities vested in the testator's widow and his daughter and could be exercised by the widow as the survivor of them and that the trustees should be ordered to distribute and pay over the residue to such charitable organizations as the widow as such survivor of the donees of the power should appoint. *Ibid*. In the suit described above it also was held that an attempted execution by the widow of the power by deed for the benefit of a private trust was void, but that such instrument did not prevent a new appointment by the widow in conformity with the terms of the power. *Ibid*.

#### *Charity.*

Provisions of a will giving the residue to the testator's wife and others as trustees with power to supply needs of the wife and of others (who died leaving the wife surviving), the remaining property to "be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose," where the widow waived the provisions for her benefit in the will, and continued to live, were held to create a valid trust for charitable purposes in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries. *Coffin v. Attorney General*, 579.

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#### *Trust.*

See TRUST, *Construction*.

#### EASEMENT.

A claim of a landowner against a town for damages for the taking of an easement in his land for the construction of a sewer is a chose in action which does not pass by a deed of the land. *Howland v. Greenfield*, 147.

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by

statute, was held to constitute a waiver of any right on the part of the land-owner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Howland v. Greenfield*, 147.

The owner of an easement to draw water from a spring on the land of another by means of a private aqueduct pipe leading from the spring through the land of a third person to a supply tank or distributor on his own land may maintain a bill in equity to enjoin a defendant from cutting the aqueduct pipe on the land of the third person and diverting the water from the spring to the defendant's land. *Wellington v. Rawson*, 189.

In such a suit it is not necessary to allege or to prove that the plaintiff was in actual possession of the land to which such easement was appurtenant, when such cutting and diverting were committed. *Ibid.*

Nor is it necessary to allege or prove that the plaintiff suffered actual damage by the wrongful acts of the defendant, legal damage being presumed from the infringement of the plaintiff's right. *Ibid.*

In the suit above described it appeared that the aqueduct right was created by an instrument signed by three persons, "each one to have an equal share of the water as the nature of the thing will admit," and that the instrument contained a restriction prohibiting a disposal of the water to any other person "but by the consent of all three of said proprietors." A master who heard the case found, on evidence warranting such a finding, that the restriction upon the sale of the water was waived by mutual consent and it was held that, in the absence of a report of all the evidence, this finding must stand. *Ibid.*

In the case above described the final decree ordered the defendant who had cut the aqueduct pipe to replace the pipe and restore it to the condition it was in at the time of the trespass and enjoined perpetually that and another defendant from interfering with the plaintiff's rights in the water and it was held that, on the facts found by the master, the plaintiff was entitled to a mandatory injunction and that the final decree was proper. *Ibid.*

The owner of an easement in land is entitled to a mandatory injunction compelling the removal of structures that violate his right, although he has suffered no pecuniary damage. *Congregation Beth Israel v. Heller*, 527.

Mandatory injunction was issued directing one who had made an unjustifiable excavation in a private way to restore it to the condition in which it was before the trespass was committed. *Ibid.*

## ELECTION.

An employee of a subscriber under the workmen's compensation act, who received an injury under circumstances creating a legal liability in a street railway company, not his employer, to pay damages in respect thereof, brought an action of tort against the street railway company to recover damages for his injury and afterwards gave notice to the insurer of his employer that he claimed compensation for his injury under the workmen's compensation act, and it was held that the bringing of the action before notice to the insurer was an election by which both the employee and the defendant in the action at law were bound, and that the plaintiff's

Election (*continued*).

right to recovery was not barred by his subsequent notice under the workmen's compensation act. *Labuff v. Worcester Consolidated Street Railway*, 170.

In the case above described it was said that, the plaintiff's election of remedy having been complete before his notice to the insurer of his employer, it was not necessary to consider whether a subsequent notice of withdrawal to the insurer operated as a waiver of the claim to compensation. *Ibid*.

Where chattels were sold under a contract of conditional sale and the buyer made default in payments and the seller took possession by an action of replevin of what was left of the property in the hands of the buyer, this was an election by the seller to treat the transaction as no sale, and he cannot afterwards maintain an action of contract for the balance of the purchase money. *Schmidt v. Ackert*, 330.

### ELECTRICITY.

Liability for negligence in the use of electricity, see appropriate subtitle under NEGLIGENCE.

### ELEVATOR.

Actions for personal injuries resulting from negligence in the maintenance of elevators, see appropriate subtitle under NEGLIGENCE.

### EMINENT DOMAIN.

Application of the principle that the taking of property by right of eminent domain is an act *strictissimi juris* and is valid only when the statutory requirements are performed with exactness. *Spare v. Springfield*, 267.

A taking of land by the park commission of a city before an appropriation, sufficient for the estimated expense thereof, shall have been made in the manner provided in R. L. c. 23, followed by an appropriation made by the city council in the manner required by the statute, is void and is not made valid by the subsequent action of the city council. *Ibid*.

An attempted taking of land under the right of eminent domain which is void for lack of jurisdiction affords ground for maintaining a suit in equity by the owner of the land to remove the cloud from his title. *Ibid*.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

### EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.

See also WORKMEN'S COMPENSATION ACT.

Actions for injuries which were received by employees within the provisions of the federal employers' liability act, see appropriate subtitle under NEGLIGENCE, *Employer's Liability*.

### EQUITABLE PLEDGE.

See PLEDGE.

## EQUITY JURISDICTION.

*Laches.*

Suit in equity under R. L. c. 72, § 5, to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Kelly v. Morrison*, 574.

*Estoppel.*

A beneficiary entitled to the income from a trust fund by assenting in writing to the allowance of a probate account of the trustees of the fund, in which certain shares of capital stock are enumerated among the securities constituting the principal of the trust fund, is not estopped from contending in a suit in equity against the trustees that the dividend by which the shares of stock were acquired was income to which the beneficiary was entitled, if the beneficiary when assenting to the allowance of the account had no knowledge of the transactions resulting in the acquisition of the shares by the trustees. *Smith v. Cotting*, 42.

*Statute of Limitations.*

Suit in equity under R. L. c. 72, § 5, to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Kelly v. Morrison*, 574.

*Plaintiff must come into Court with Clean Hands.*

In a suit in equity by one of the stockholders of a trading stamp corporation, which had conducted a monopolistic business in violation of St. 1908, c. 454, against the corporation and the other parties to the enterprise, it was said that, "The theory of the law is that general morality and business integrity are best promoted by not undertaking to aid repentant participants in executed illegal transactions" and by leaving them without remedy against one another. *Duane v. Merchants Legal Stamp Co.* 113.

No federal question was raised when this case was a second time before this court and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Ibid.*

*Duane v. Merchants Legal Stamp Co.* 227 Mass. 466, affirmed and declared not to be distinguishable from *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393. *Ibid.*

A judgment creditor of a corporation, who also was a stockholder, cannot maintain a suit in equity to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by the valid vote of the directors, where it appears that the plaintiff had full cognizance of and acquiesced in the execution of

the mortgages in controversy and also that he obtained his judgment by misleading the officers of the corporation and preventing them from contesting the action in which he obtained it. *Soghomonian v. Garabedian*, 445.

#### *Accounting.*

Where in a suit in equity against trustees holding property for the benefit of three beneficiaries, one of whom was one of the trustees, for an accounting, it appeared that the defendant who was both a trustee and a beneficiary misappropriated certain articles of personal property belonging to the trust, but afterwards delivered some of these articles to the other two beneficiaries, it was held that the acceptance by the other two beneficiaries did not estop them from requiring that defendant to account for a further large amount of like property misappropriated by her. *Schneider v. Hayward*, 352.

In the case above described it was held that it was within the discretionary power of the trial judge, upon the cross-examination of one of the three beneficiaries by the misappropriating defendant, to refuse to permit the witness to be asked how the articles set off to her and to the plaintiff compared in value with those received by the defendant, this being a collateral matter. *Ibid*.

In a suit in equity against trustees for an accounting, where it has been shown that one of the defendants, who also was a beneficiary, without justification removed to another State certain articles of personal property belonging to the trust and thus practically deprived the other beneficiaries of the opportunity of having the articles examined and appraised by experts, such defendant cannot complain rightly of the evidence of the value of the misappropriated articles to which the parties interested have been compelled to resort by the obstacles to a proper valuation of the articles voluntarily created by that defendant. *Ibid*.

Demurrers to a bill in equity by a manufacturer, and a corporation which he formed, against individuals composing the board of trade of a municipality in this Commonwealth, a building corporation and a contractor, seeking a determination of the validity of contentions of the various parties relating to contracts and transactions as to the procuring of a building site and factory for the plaintiffs, accountings between and among all parties, a restraining of actions at law begun and threatened against the plaintiffs, and discovery of the facts as to the contract between the board of trade and the contractor, were sustained because it was held that adequate and complete remedies were afforded at law, and there was no jurisdiction in equity upon the facts alleged. *American Broaching Machine Co. v. Marlborough Board of Trade*, 522.

#### *Breach of Fiduciary Relation.*

Upon facts found by a master to whom was referred a suit in equity by a woman against her sister and her sister's husband to set aside a note and a mortgage given by the plaintiff to the defendants, it was held that a failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants under the circumstances to disclose to the plaintiff every material

fact which affected the value of the property or which might induce or determine her action. *Fardy v. Buckley*, 377.

In the case above described a master found "that the defendants did not fraudulently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," and it was held that, in view of the other facts found, this finding was immaterial, as, where such fiduciary relations exist, the duty to disclose does not depend on the motives or intentions of the persons whose duty it is to make the disclosure. *Ibid.*

In the same case it was held that it also was irrelevant that the property might have been worth at the date of the sale more than the plaintiff paid for it. *Ibid.*

In the suit above described the bill contained a prayer for general relief, and it was said, that the plaintiff not only had the right of rescission, but, if she elected to keep the property, might have the defendants ordered to account to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her. *Ibid.*

#### *To cancel Instrument.*

A suit in equity by a married woman, seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, was dismissed because the debt secured by the mortgage was paid in full by the mortgagor to the plaintiff's husband who applied the money in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question. *Clark v. Young*, 156.

In the same suit it was held that, whether or not renewals of the plaintiff's notes to the trust company, which were paid with the money received from the defendant, were made in her name by her husband without her authority was immaterial. *Ibid.*

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*Equity Jurisdiction (continued).*

elected to keep the property, might have the defendants ordered to account to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her. *Fardy v. Buckley*, 377.

*To cancel Discharge of Mortgage made on Margin of Record by Mistake.*

In a suit in equity by a mortgagee of real estate for the cancellation of a discharge of the plaintiff's unpaid mortgage which had been entered by mistake on the margin of the record in the registry of deeds, it appeared that two of the defendants had attached the real estate after the apparent discharge of the mortgage on the record and without knowledge of the mistake, and it was held that the bill must be dismissed as to the defendant attaching creditors, whose liens took precedence of the plaintiff's mortgage. *Walkham Co-operative Bank v. Barry*, 270.

*To set aside Mortgage.*

A judgment creditor of a corporation, who also was a stockholder, cannot maintain a suit in equity to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by the valid vote of the directors, where it appears that the plaintiff had full cognizance of and acquiesced in the execution of the mortgages in controversy and also that he obtained his judgment by misleading the officers of the corporation and preventing them from contesting the action in which he obtained it. *Soghomonian v. Garabedian*, 445.

*To foreclose Mortgage.*

Assuming that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a mortgage of real estate containing a power of sale, the existence of the soldiers' and sailors' civil relief act is a special circumstance which gives the courts of equity in this Commonwealth jurisdiction to foreclose such mortgages made within the time specified in the act. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

*To enforce Equitable Pledge.*

Provision in a policy of life insurance which was said to make a payment by the insurer of the amount due under the policy to the administrator of the estate of the insured a defence to a suit in equity by a creditor of the insured having an interest as an equitable pledgee of the policy. *Pettit v. Prudential Ins. Co. of America*, 394.

It also was said that, whether the creditor described above had any equitable priority of claim to the insurance money in the hands of the administrator, could not be considered in a proceeding to which the administrator was not a party. *Ibid.*

*To reach and apply Property conveyed with Intent to defeat, delay and defraud Creditors.*

The right given to a creditor under R. L. c. 159, § 3, cl. 8, to maintain a suit in equity to reach and apply in satisfaction of a debt property conveyed by the

debtor with intent to defeat, delay or defraud his creditors is concurrent with his right given by R. L. c. 178, §§ 1, 47, to levy an execution obtained against the debtor in an action at law upon land of the debtor so conveyed. *Bress v. Gersinovich*, 563.

Where the bill in such a suit alleges that, by order of a municipal court in poor debtor session, the debtor had assigned to the plaintiff all his right, title and interest in the land so conveyed by him, and that, at a sheriff's sale after a levy of his execution in the action at law upon the land, it was sold to the plaintiff, a demurrer by the defendant on the ground that the plaintiff has a complete and adequate remedy at law will not be sustained. *Ibid*.

*To enforce Promise to Another for Plaintiff's Benefit.*

A steel contractor, who under a contract with a builder furnished to the builder the structural steel required for a building to be constructed by the builder under a contract with a boiler company, upon the builder becoming bankrupt, was held not entitled to maintain a suit in equity against the boiler company and the trustee in bankruptcy of the builder, seeking to have the boiler company ordered to pay the plaintiff for the structural steel furnished for the building instead of paying the contract price to the trustee in bankruptcy of the builder, even if it was agreed between the boiler company and the builder that the boiler company as principal should pay all bills for materials furnished by subcontractors, that being a promise made for the steel company's benefit to another person, from whom alone the consideration moved and who was not his agent. *New England Structural Co. v. James Russell Boiler Works Co.* 274.

*To relieve from Results of Fraud.*

Upon facts found by a master to whom was referred a suit in equity by a woman against her sister and her sister's husband to set aside a note and a mortgage given by the plaintiff to the defendants, it was held that a failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants under the circumstances to disclose to the plaintiff every material fact which affected the value of the property or which might induce or determine her action. *Fardy v. Buckley*, 377.

In the case above described a master found "that the defendants did not fraudulently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," and it was held that, in view of the other facts found, this finding was immaterial, as, where such fiduciary relations exist, the duty to disclose does not depend on the motives or intentions of the persons whose duty it is to make the disclosure. *Ibid*.

In the same case it was held that it also was irrelevant that the property might have been worth at the date of the sale more than the plaintiff paid for it. *Ibid*.

In the suit above described the bill contained a prayer for general relief, and it was said, that the plaintiff not only had the right of rescission, but, if she elected to keep the property, might have the defendants ordered to account

to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her. *Fardy v. Buckley*, 377.

*To remove Cloud from Title.*

A judge of the Superior Court has authority to allow the plaintiff in a suit in equity to redeem land from a tax sale to amend his bill into a bill to remove from the plaintiff's title a cloud created by a void tax sale or, if such tax sale shall be held to be good, to redeem from it. Prayers for such alternative relief properly may be joined in one bill. *Phelps v. Creed*, 228.

A bill in equity may be maintained by the owner of two lots of land to set aside a tax deed as a cloud upon his title, where the tax sale was of both lots, which were one mile apart, for a lump sum and the conveyance was by one deed stating the balance due for taxes in each of the successive years on the two lots together, the notice of the sale not conforming to R. L. c. 13, § 38 (now St. 1909, c. 490, Part II, § 39). *Ibid*.

An attempted taking of land under the right of eminent domain which is void for lack of jurisdiction affords ground for maintaining a suit in equity by the owner of the land to remove the cloud from his title. *Spare v. Springfield*, 267.

*Appointment and Removal of Trustees.*

Effect of the appointment by the Supreme Judicial Court, in a suit in equity properly before it, of trustees under a trust deed which contained provisions as to perpetuation of the board, and tenure of office of trustees so appointed. *Attorney General v. Armstrong*, 196.

*To restrain Actions at Law.*

Demurrers to a bill in equity by a manufacturer, and a corporation which he formed, against individuals composing the board of trade of a municipality in this Commonwealth, a building corporation and a contractor, seeking a determination of the validity of contentions of the various parties relating to contracts and transactions as to the procuring of a building site and factory for the plaintiffs, accountings between and among all parties, a restraining of actions at law begun and threatened against the plaintiffs, and discovery of the facts as to the contract between the board of trade and the contractor, were sustained, because it was held that adequate and complete remedies were afforded at law, and there was no jurisdiction in equity upon the facts alleged. *American Broaching Machine Co. v. Marlborough Board of Trade*, 522.

*To redeem from Tax Sale.*

A judge of the Superior Court has authority to allow the plaintiff in a suit in equity to redeem land from a tax sale to amend his bill into a bill to remove from the plaintiff's title a cloud created by a void tax sale or, if such tax sale shall be held to be good, to redeem from it. Prayers for such alternative relief properly may be joined in one bill. *Phelps v. Creed*, 228.

What effect, if any, St. 1915, c. 237, had on bills to redeem from lawful sales for non-payment of taxes which were pending when that statute took effect,

here was mentioned as a question which did not arise in the present case, where a tax sale was set aside as unlawful. *Phelps v. Creed*, 228.

#### *Circuity of Actions.*

Demurrers to a bill in equity by a manufacturer, and a corporation which he formed, against individuals composing the board of trade of a municipality in this Commonwealth, a building corporation and a contractor, seeking a determination of the validity of contentions of the various parties relating to contracts and transactions as to the procuring of a building site and factory for the plaintiffs, accountings between and among all parties, a restraining of actions at law begun and threatened against the plaintiffs, and discovery of the facts as to the contract between the board of trade and the contractor, were sustained, because it was held that adequate and complete remedies were afforded at law, and there was no jurisdiction in equity upon the facts alleged. *American Broaching Machine Co. v. Marlborough Board of Trade*, 522.

#### *To enjoin Maintenance of Sewer.*

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, was held to constitute a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Howland v. Greenfield*, 147.

#### *Multiplicity of Suits.*

Demurrers to a bill in equity by a manufacturer, and a corporation which he formed, against individuals composing the board of trade of a municipality in this Commonwealth, a building corporation and a contractor, seeking a determination of the validity of contentions of the various parties relating to contracts and transactions as to the procuring of a building site and factory for the plaintiffs, accountings between and among all parties, a restraining of actions at law begun and threatened against the plaintiffs, and discovery of the facts as to the contract between the board of trade and the contractor, were sustained, because it was held that adequate and complete remedies were afforded at law, and there was no jurisdiction in equity upon the facts alleged. *American Broaching Machine Co. v. Marlborough Board of Trade*, 522.

#### *To enjoin Infringement of Easement.*

The owner of an easement to draw water from a spring on the land of another by means of a private aqueduct pipe leading from the spring through the land of a third person to a supply tank or distributor on his own land may maintain a bill in equity to enjoin a defendant from cutting the aqueduct pipe on the land of the third person and diverting the water from the spring to the defendant's land. *Wellington v. Rawson*, 189.

In such a suit it is not necessary to allege or to prove that the plaintiff was in actual possession of the land to which such easement was appurtenant when such cutting and diverting were committed. *Wellington v. Rawson*, 189.

Nor is it necessary to allege or prove that the plaintiff suffered actual damage by the wrongful acts of the defendant, legal damage being presumed from the infringement of the plaintiff's right. *Ibid*.

In the suit above described it appeared that the aqueduct right was created by an instrument signed by three persons, "each one to have an equal share of the water as the nature of the thing will admitt," and that the instrument contained a restriction prohibiting a disposal of the water to any other person "but by the consent of all three of said proprietors." A master who heard the case found, on evidence warranting such a finding, that the restriction upon the sale of the water was waived by mutual consent, and it was held that, in the absence of a report of all the evidence, this finding must stand. *Ibid*.

In the case above described the final decree ordered the defendant who had cut the aqueduct pipe to replace the pipe and restore it to the condition it was in at the time of the trespass and enjoined perpetually that and another defendant from interfering with the plaintiff's rights in the water, and it was held that, on the facts found by the master, the plaintiff was entitled to a mandatory injunction and that the final decree was proper. *Ibid*.

#### *To enjoin Interference with Water Rights.*

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, where it appeared that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, it was held that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the authorized diversion of the water. *Isbell v. Greylock Mills*, 233.

#### *To enjoin Trespass.*

The owner of the fee of land used as a private way, which he holds under a deed providing that the way is to be forever used as a passageway by him in common with owners and occupants of the land abutting thereon, may maintain a suit in equity against another owner of land abutting on the way, whose deed provides that he shall have "a free and uninterrupted right, use and privilege in" the way, and who has made an excavation in the way and has constructed a bulkhead there, such acts of the defendant being without excuse. *Congregation Beth Israel v. Heller*, 527.

In such suit a mandatory injunction may be issued directing the defendant to restore the way to the condition in which it was before he committed the trespass. *Ibid*.

The maintenance of such a suit is not precluded by the mere facts that other abutting owners placed in the way coal holes with covers and gratings for lighting cellars, nor by the fact, if it is a fact, that the defendant had a right to lay water pipes in the way. *Ibid*.

*To enjoin Use of Name of Deceased Partner.*

St. 1853, c. 156, now in substance R. L. c. 72, § 5, gives a right to the executor or administrator of the estate of a deceased partner which before the passage of the statute was unknown to the common law or in equity, and under the next section the executor or administrator of the estate of a deceased partner can maintain a suit in equity to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business. *Kelly v. Morrison*, 574.

Such a suit in equity may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Ibid.* By the statute named above the right to maintain a suit in equity to enjoin the continuance of the use of the name of a deceased partner is given only to "his legal representatives," and former partners of a firm that used the name of the deceased after his death cannot maintain such a suit. *Ibid.*

*To enjoin Unlawful Interference.*

See UNLAWFUL INTERFERENCE.

*Mandatory Injunction.*

Facts in a suit in equity to enjoin interference with a water aqueduct were held to warrant a mandatory injunction. *Wellington v. Rawson*, 189.

The owner of an easement in land is entitled to a mandatory injunction compelling the removal of structures that violate his right, although he has suffered no pecuniary damage. *Congregation Beth Israel v. Heller*, 527.

Mandatory injunction was issued directing one who had made an unjustifiable excavation in a private way to restore it to the condition in which it was before the trespass was committed. *Ibid.*

*Damages.*

The owner of an easement in land is entitled to a mandatory injunction compelling the removal of structures that violate his right, although he has suffered no pecuniary damage. *Congregation Beth Israel v. Heller*, 527.

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, where it appeared that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, it was held that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the authorized diversion of the water. *Isbell v. Greylock Mills*, 233.

## EQUITY PLEADING AND PRACTICE.

*Parties.*

In a suit in equity by beneficiaries of a trust against a co-beneficiary, who also was a trustee, for an accounting as to misappropriated property, where only

one of the defendant trustees had appealed from the final decree, the court declined to grant a request made at the argument before this court by the counsel for the other trustees, that the decree be modified in their favor, they not being parties to the proceeding in this court and the aspect of the case affecting them not having been presented. *Schneider v. Hayward*, 352.

#### *Bill.*

Prayers for alternative relief, removing from the plaintiff's title a cloud created by a void tax sale or, if such tax sale should be held to be good, to redeem from it, properly may be joined in one bill. *Phelps v. Creed*, 228.

#### *Amendment.*

A judge of the Superior Court has authority to allow the plaintiff in a suit in equity to redeem land from a tax sale to amend his bill into a bill to remove from the plaintiff's title a cloud created by a void tax sale or, if such tax sale shall be held to be good, to redeem from it. *Phelps v. Creed*, 228.

#### *Discontinuance.*

The filing of a discontinuance by the plaintiff in a suit in equity is a waiver of a bill of exceptions previously filed by him. *Keown v. Keown*, 404.

The right of the plaintiff in a suit in equity to discontinue his suit on payment of costs is extinguished by an interlocutory decree sustaining a demurrer to the bill for want of equity with leave to the plaintiff to amend his bill within thirty days and, if such amended bill is not filed, dismissing the bill with costs, followed by a failure to amend and a final decree dismissing the bill with costs. *Ibid.*

#### *Master.*

##### *Findings of fact.*

Findings of fact contained in a master's report, which does not report the evidence on which they were based, are not subject to review. *Clark v. Young*, 156.

Where a suit in equity for an accounting was referred to a master, to find and report the facts, and he filed a report, reporting no evidence, and the exceptions filed to this report were overruled by an interlocutory decree from which no appeal was taken, and where the case then was referred to a second master to state the final account, and this master filed a report, stating the account, without reporting any evidence, and one of the parties filed exceptions to his report, which were overruled by an interlocutory decree, followed by a final decree, from both of which the same party appealed, it was held that the findings of fact stated in the first master's report must stand except so far as modified by subsequent and additional facts stated in the second master's report. *Schmidt v. Hayward*, 352.

It further was held that, as no evidence was reported, no finding of fact in either report was open to revision and the only questions open were those raised by the exceptions to the second master's report and those arising on appeal from the final decree, namely, whether the decree was within the scope of the bill and was warranted by the facts found by the two masters. *Ibid.*

**Recommittal.**

A motion to recommit a master's report is addressed to the discretion of the trial judge. *Clark v. Young*, 156.

In a suit in equity the trial judge had denied a motion of the defendants to recommit the case to the master "for the reasons set forth in their exceptions," and it was pointed out that this motion was addressed to the discretion of the trial judge and that there was nothing to indicate an abuse of discretion in denying it. *Baush Machine Tool Co. v. Hill*, 30.

It also was said that, for all that appeared, the trial judge received and considered evidence as to the truth of the alleged facts on which the motion was based and found that the allegations were not true. *Ibid.*

**Objections and exceptions to report.**

In a suit in equity against a labor union to enjoin a strike, an exception of the defendants to a finding in the master's report, that the constitution of the Employers' Association would not prevent the plaintiff from settling the strike, on the ground that this finding was a conclusion of law, could not be sustained because the constitution of the Employers' Association was not before the court. *Baush Machine Tool Co. v. Hill*, 30.

It also was pointed out, that, if the exception were sustained and this finding of the master were stricken from the report, it would not help the defendants. *Ibid.*

Another exception of the defendants to the master's report in the above case on the ground that the plaintiff belonged to the Employers' Association, which was an unlawful one in restraint of trade, was overruled because the master in his report did not state that any evidence of the alleged facts referred to in the exception was introduced before him. *Ibid.*

An exception to a master's report in a suit in equity must be based on matters appearing on the face of the report and an exception resting only on the assertion of counsel cannot be considered. *Ibid.*

*Incompetent Evidence not affecting Result.*

Where on an appeal in a suit in equity it appeared that some of the evidence reported was incompetent, but that, if all the evidence to which objection was made should be excluded, the controlling facts would be in no way changed, it was held that no reversible error was shown. *Warner v. Brown*, 333.

*Record.*

In a suit in equity coming before this court on an appeal by the plaintiff from a final decree dismissing his bill with costs upon demurrer, if the plaintiff as the appealing party does not cause the demurrer to be printed in the record, it will be presumed to have been sufficient in form. *Keown v. Keown*, 404.

*Exceptions.*

The filing of a discontinuance by the plaintiff in a suit in equity is a waiver of a bill of exceptions previously filed by him. *Keown v. Keown*, 404.



*Appeal.*

An attempted appeal to this court, not taken according to law, is not before the court and cannot be considered. *Martin's Case*, 402.

Findings of fact contained in a master's report, which does not report the evidence on which they were based, are not subject to review. *Clark v. Young*, 156.

Where on an appeal in a suit in equity it appeared that some of the evidence reported was incompetent, but that, if all the evidence to which objection was made should be excluded, the controlling facts would be in no way changed, it was held that no reversible error was shown. *Warner v. Brown*, 333.

Where a suit in equity for an accounting was referred to a master, to find and report the facts, and he filed a report, reporting no evidence, and the exceptions filed to this report were overruled by an interlocutory decree from which no appeal was taken, and where the case then was referred to a second master to state the final account, and this master filed a report, stating the account, without reporting any evidence, and one of the parties filed exceptions to his report, which were overruled by an interlocutory decree, followed by a final decree, from both of which the same party appealed, it was held that the findings of fact stated in the first master's report must stand except so far as modified by subsequent and additional facts stated in the second master's report. *Schneider v. Hayward*, 352.

It further was held that, as no evidence was reported, no finding of fact in either report was open to revision and the only questions open were those raised by the exceptions to the second master's report and those arising on appeal from the final decree, namely, whether the decree was within the scope of the bill and was warranted by the facts found by the two masters. *Ibid.*

In the suit above described, where only one of the defendant trustees had appealed from the final decree, the court declined to grant a request made at the argument before this court by the counsel for the other trustee, that the decree be modified in their favor, they not being parties to the proceeding in this court and the aspect of the case affecting them not having been presented. *Ibid.*

In a suit in equity coming before this court on an appeal by the plaintiff from a final decree dismissing his bill with costs upon demurrer, if the plaintiff as the appealing party does not cause the demurrer to be printed in the record, it will be presumed to have been sufficient in form. *Keown v. Keown*, 404.

*Alternative Relief.*

Prayers for alternative relief, removing from the plaintiff's title a cloud created by a void tax sale or, if such tax sale should be held to be good, to redeem from it, properly may be joined in one bill. *Phelps v. Creed*, 228.

In a suit to cancel a note and mortgage securing it which the plaintiff had been induced to take through a breach by the defendants of a duty to disclose certain facts, it was said, that the plaintiff not only had the right of rescission, but, if she elected to keep the property, might have the defendants ordered to account to her for their secret profit, as the plaintiff was entitled to keep the property at the price which it had cost the defendants when they conveyed it to her. *Fardy v. Buckley*, 377.

## ESTOPPEL.

A beneficiary entitled to the income from a trust fund by assenting in writing to the allowance of a probate account of the trustees of the fund, in which certain shares of capital stock are enumerated among the securities constituting the principal of the trust fund, is not estopped from contending in a suit in equity against the trustees that the dividend by which the shares of stock were acquired was income to which the beneficiary was entitled, if the beneficiary when assenting to the allowance of the account had no knowledge of the transaction resulting in the acquisition of the shares by the trustees. *Smith v. Cotting*, 42.

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, was held to constitute a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Howland v. Greenfield*, 147.

Merely entrusting the possession of a chattel to a third person and permitting him to use it for many years do not estop the owner from asserting his title to the chattel against one attaching it as the property of such third person. *Orcutt v. Gast*, 305.

Where in a suit in equity against trustees holding property for the benefit of three beneficiaries, one of whom was one of the trustees, for an accounting, it appeared that the defendant who was both a trustee and a beneficiary misappropriated certain articles of personal property belonging to the trust, but afterwards delivered some of these articles to the other two beneficiaries, it was held that the acceptance by the other two beneficiaries did not estop them from requiring that defendant to account for a further large amount of like property misappropriated by her. *Schneider v. Hayward*, 352.

## EVIDENCE.

*Presumptions and Burden of Proof.*

The trial of an action lasted six weeks and was complicated by the elimination, upon an election of the plaintiff at the close of the evidence, of two of the counts of the declaration and of much of the auditor's reports. The defendant moved for a new trial and the motion was overruled; and it was said that, as a practical matter, if it had appeared to the presiding judge that the defendant's rights had not been safeguarded properly by the jury, it was to be presumed that the motion for a new trial would have been granted. *Matthews v. New York Central & Hudson River Railroad*, 10.

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

Mere disbelief of testimony is not the equivalent of evidence to the contrary. *Phillips v. Gookin*, 250.

In an action for personal injuries sustained by being struck by a motor car of the defendant, proof that the defendant owned the car, without any

Evidence (*continued*).

evidence that he was in control of it or that the person driving it was his servant, does not entitle the plaintiff to go to the jury. *Phillips v. Gookin*, 250.

In a claim under the workmen's compensation act by the dependent of an employee, who was found dead with his throat cut by a dangerous machine on which he worked and into which he had fallen, the burden of proof is upon the dependent to show that the employee was alive when he fell into the machine. *Dow's Case*, 348.

Docket entries of a court from which a writ of supersedeas purports to have issued and an indorsement upon the bond signed by the clerk of the court, from which, it was held, it sufficiently appeared that all proper things were done by or by direction of the court and that it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue. *Keith v. Rosnosky*, 409.

In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, alleged to have been caused by negligence of the defendant causing an overflow of water, it was held that on circumstantial evidence a finding for the plaintiff was warranted. *Goldberg v. Federman*, 443.

Where the treasurer of an importing corporation in purchasing for the corporation foreign drafts from a bank, for the purpose of deceiving the cashier, bookkeeper and auditor of the corporation, fraudulently altered and raised the amounts of the receipts given him by the bank for the money paid for the drafts, misappropriating for himself the difference between the false amounts inserted by him and the true ones, and causing it falsely to appear that the bank had bound itself to transmit larger sums in foreign money than it had contracted to do, an intent to defraud is a necessary inference from these acts, making the alteration of the receipts forgery. *Commonwealth v. Peakes*, 449.

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate while in the exercise of due care by the negligence of the defendant's servant, the presumption created by St. 1914, c. 553, is commensurate with the degree of care required by law of the intestate in order that the plaintiff may recover damages. *Powers v. Loring*, 458.

Presumption that instructions by the trial judge were followed by the jury. *Dempsey v. Goldstein Brothers Amusement Co.* 461.

In an action against a street railway company for personal injuries, where, at the trial, the defendant's conductor was in court but neither the plaintiff nor the defendant called him as a witness, it was held that a request by the defendant for an instruction that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident," should have been given. *London v. Bay State Street Railway*, 480.

Where in a bill of exceptions in an action of contract it was stated as a material fact, that the plaintiff was elected president of a Massachusetts business

corporation, it was taken, in the absence of any statement to the contrary, that the plaintiff was elected as such president under St. 1903, c. 437, § 18, and therefore that he was elected for the term of one year. *Moss v. Copelof*, 513.

Evidence which was held to overcome as a matter of law the presumption created by St. 1914, c. 553. *Benton v. Watson*, 582.

Applications of the doctrine, *res ipsa loquitur*, see appropriate subtitle under NEGLIGENCE.

#### *Negative Evidence.*

Mere disbelief of testimony is not the equivalent of evidence to the contrary. *Phillips v. Gookin*, 250.

#### *Inferences.*

In an action for personal injuries sustained on a winter day by reason of a fall caused by slipping on a step, alleged to have been defective and dangerous, leading to a door of the defendant's house which the plaintiff was invited by the defendant to enter, where there is no evidence that the step was defective in any way and the only evidence bearing on the cause of the injury is the testimony of the plaintiff, "I felt this slipperiness of something. My foot slipped sideways on something," there is nothing to warrant an inference that the defendant was negligent. *Sheehan v. Holland*, 246.

#### *Matters of Common Knowledge.*

A motorman operating a street railway car at night, who sees a man standing in line with a white post, at which that car is not to stop, which is about five feet from the track, reasonably may believe that the man is not in danger of being struck by the running board of the car as it passes him. *Daigneau v. Worcester Consolidated Street Railway*, 166.

#### *Circumstantial.*

In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, alleged to have been caused by negligence of the defendant causing an overflow of water, it was held that on circumstantial evidence a finding for the plaintiff was warranted. *Goldberg v. Federman*, 443.

#### *Matters of Conjecture.*

In an action for personal injuries sustained on a winter day by reason of a fall caused by slipping on a step, alleged to have been defective and dangerous, leading to a door of the defendant's house which the plaintiff was invited by the defendant to enter, where there is no evidence that the step was defective in any way and the only evidence bearing on the cause of the injury is the testimony of the plaintiff, "I felt this slipperiness of something. My foot slipped sideways on something," there is nothing to warrant an inference that the defendant was negligent. *Sheehan v. Holland*, 246.

#### *Admissions.*

Statement by a railroad corporation in a report to the Industrial Accident Board as to a fatal accident was held not to be an admission of negligence

Evidence (*continued*).

by the defendant, and was not to be excluded as a self-serving statement. *Casey v. Boston & Maine Railroad*, 529.

### *Extrinsic affecting Writings.*

It was held that, by reason of a covenant in a bill of sale in writing and under seal of the good will of a garage and its equipment, in the absence of fraud inducing the sale, the purchaser could not maintain an action of contract against the seller for breach of an oral warranty as to the cost of the equipment purchased. *Carpenter v. Sugden*, 1.

In an action against one of two joint tortfeasors, it appeared that before the action was brought the plaintiff had brought an action for her injuries against the other tortfeasor, which she discontinued under an agreement by which she covenanted with the landowner not to sue him and received from him the sum of \$1,500, the instrument reciting that it did not release the plaintiff's cause of action against any one other than the landowner, and it was pointed out that the defendant, not being a party to the instrument, could introduce oral evidence to show that the plaintiff accepted the money in release of all claims against her employer. *O'Neil v. National Oil Co.* 20.

In the above case it also was pointed out that, although there was evidence which would have warranted such a finding, this was a question of fact for the jury and that they had a right to find that the money was not accepted for this purpose. *Ibid.*

In determining the character and extent of the authority given by a power of attorney, it is permissible to examine all the circumstances under which the instrument was executed, so far as those circumstances were actually or presumably present in the minds of the parties, for the purpose of enabling the court to understand the situation of the parties and to apply their words to the right subject matter in the light of all attendant conditions, and for this purpose oral evidence is admissible. *Warner v. Brown*, 333.

### *Competency.*

Where on an appeal in a suit in equity it appeared that some of the evidence reported was incompetent, but that, if all the evidence to which objection was made should be excluded, the controlling facts would be in no way changed, it was held that no reversible error was shown. *Warner v. Brown*, 333.

In an action for personal injuries answers of a medical expert, called by the defendant, to a question on cross-examination, "Who asked you, doctor, to examine this woman?" "Mr. C, representing the Casualty Company of America, the manager," was held properly to have been permitted to stand, the judge instructing the jury not to take into account the fact that the defendant was insured, that this was "of absolutely no consequence." *Dempsey v. Goldstein Brothers Amusement Co.* 461.

At the trial of an indictment for forgery and larceny by a treasurer of a corporation, it was held that it was proper on the cross-examination of the defendant to ask him, whether he intended to make the stenographer of the corporation believe that he was going to send the letter which he was dictating to her and which he afterwards destroyed, the answer called for

being competent as tending to show that the defendant was acting with a fraudulent intent and not honestly. *Commonwealth v. Peakes*, 449.

In an action where a verdict was ordered for the defendants and the plaintiff had alleged exceptions and it appeared that the jury were warranted in finding for the plaintiff against one of the joint defendants without considering certain evidence, which the defendant contended was incompetent, it was held that it was not necessary to pass upon the question, whether such evidence should be considered, or upon the competency of the evidence thus admitted. *Johnstone v. Cochrane*, 472.

In an action against a street railway company for personal injuries, where, at the trial, the defendant's conductor was in court but neither the plaintiff nor the defendant called him as a witness, it was held that a request by the defendant for an instruction that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident," should have been given. *London v. Bay State Street Railway*, 480.

Evidence of signs of fright of an onlooker is incompetent to show negligence on the part of a chauffeur driving a motor car which overturns. *Flynn v. Lewis*, 550.

Where a complaint under R. L. c. 76, § 8, charges the defendant with unlawfully holding himself out as a practitioner of medicine between two dates named, the complaint is for a continuing offence and the time during which the defendant is charged with having committed a series of acts is a material part of the offence described, and accordingly evidence of acts committed by the defendant before the time specified must be excluded. *Commonwealth v. Runge*, 598.

#### *Relevancy and Materiality.*

Evidence, even if inadmissible, if material and admitted without objection, properly may be considered by the jury. *Matthews v. New York Central & Hudson River Railroad*, 10.

At the trial of an action of tort against the New York Central and Hudson River Railroad Company for damages caused to property of the plaintiff adjacent to the railroad in Boston by unreasonable and unnecessary excess of smoke, soot and cinders from the defendant's locomotives, it is proper to exclude as immaterial questions asked of the plaintiff in cross-examination as to his applying during the period of the alleged wrongful acts of the defendant for an abatement of taxes on other properties belonging to him on different streets not nearer than a quarter of a mile to the property in question and not affected by the railroad. *Ibid.*

At the trial of the action above described, by reason of a question asked by the defendant of a witness in cross-examination, it was held proper for the witness to testify on redirect examination that in one of the years covered by the action he had observed about one hundred engines on the New York, New Haven, and Hartford Railroad in the vicinity of Cumberland and Durham streets. *Ibid.*

Part of the property alleged in the action above described to have been damaged was a hotel. The defendant introduced evidence showing the gross receipts of the hotel during a certain period. Subject to an exception by the defendant, the plaintiff was allowed to read a column of payments

Evidence (*continued*).

for taxes and other matters, as prepared by the defendant's expert. Later the entire paper was put in evidence without objection, and it was held that the exception must be overruled. *Matthews v. New York Central & Hudson River Railroad*, 10.

In an action for personal injuries received when an elevator fell because of a defective safety device, it was held that evidence properly was admitted on which it could have been found that the safety device was an obsolete and improper appliance, because an improved safety device had been in common use for a considerable period before the accident, by the adoption of which the accident would have been avoided. *Draper v. Cotting*, 51.

In an action by an executor against a street railway corporation for causing the death of the plaintiff's testator by running into him with a car which he knew was approaching, failure to ring a bell or sound a whistle to give notice of the car's approach was held to be immaterial, because the testator knew of the car's approach. *Anger v. Worcester Consolidated Street Railway*, 163.

In the same case it was held that evidence, that, if the bell had been rung or the whistle had been sounded, the testator would have heard it, properly was excluded as immaterial. *Ibid*.

At the trial of an action for personal injuries sustained from being run into by a motor car owned and driven by the defendant when the plaintiff was riding a motor cycle on a highway, where the plaintiff had testified that at the time of the accident he did not have an operator's license to run a motor cycle, it was proper to exclude a question asked him on his cross-examination by the defendant, "Did you ever have an operator's license to run a motor cycle?" *Polmatier v. Newbury*, 307.

In the same case it was said that in making the decision stated above the court did not mean to intimate that the question was not excluded properly on the ground, that acts of negligence committed on other occasions than the one in question are inadmissible because they lead to collateral inquiries which would distract the jury from the issue on trial and have no logical tendency to determine it. *Ibid*.

In a suit in equity by beneficiaries under a trust against a co-beneficiary, who also was the trustee, to compel an accounting for misappropriated articles, it was held that it was within the discretionary power of the trial judge, upon the cross-examination of one of the three beneficiaries by the misappropriating defendant, to refuse to permit the witness to be asked how the articles set off to her and to the plaintiff compared in value with those received by the defendant, this being a collateral matter. *Schneider v. Hayward*, 352.

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury, but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release; and the release therefore was not admissible in evidence in an action against the surgeon. *Purchase v. Seelye*, 434.

In an action for personal injuries alleged to have resulted from negligence of the driver of a motor car, the presiding judge excluded evidence offered by the plaintiff to show, that on the morning of the day of the accident, when the defendant's wife was using the motor car, the chauffeur drove fast, the plaintiff contending that this tended to show reckless habits of the chauffeur which were known or ought to have been known to the defendant, and it was held that the evidence was excluded properly. *Flynn v. Lewis*, 550.

Where a complaint under R. L. c. 76, § 8, charges the defendant with unlawfully holding himself out as a practitioner of medicine between two dates named, the complaint is for a continuing offence and the time during which the defendant is charged with having committed a series of acts is a material part of the offence described, and accordingly evidence of acts committed by the defendant before the time specified must be excluded. *Commonwealth v. Runge*, 598.

#### *Best and Secondary.*

At the trial of an indictment for forgery and larceny by the treasurer of a corporation, the exclusion of the testimony of the cashier of a certain bank, offered for the purpose of showing that the bank had held certain notes which were signed by the defendant and were indorsed by the president of the corporation, was held to have been proper, the notes not being produced in court and the witness stating that he did not know the signature of the president of the corporation. *Commonwealth v. Peakes*, 449.

#### *Declarations of Deceased Persons.*

In an action against an electric light company for causing the death and conscious suffering of a boy, the jury found for the defendant on a count for conscious suffering, and it was held that an exception by the defendant to the admission of certain alleged declarations of the boy under R. L. c. 175, § 66, must be overruled because these declarations had been made immaterial upon the count for conscious suffering by the verdict on that count; and they could not be considered as evidence in support of the count for causing death because the boy could not be found to have made intelligent declarations. *Jordan v. Adams Gas Light Co.* 186.

In the case above described it was assumed, in the absence of any exception to any part of the judge's charge, that the judge properly had instructed the jury to disregard the alleged declarations if the boy did not suffer consciously. *Ibid.*

At the trial of an indictment under R. L. c. 212, § 15, for unlawfully attempting by the use of a certain instrument to procure the miscarriage of a certain woman, in consequence of which she died, the dying declarations of the woman, made when she fully realized that she had no hope of recovery, contained in the form of answers to questions in a paper subscribed and sworn to by her before a justice of the peace, who testifies to having taken down the answers as nearly as he could in writing long hand, are admissible in evidence, and the presiding judge properly may allow the contents of the paper to be read to the jury. *Commonwealth v. Wagner*, 265.

The statements of the woman contained in such a paper, which describe her purpose in seeking medical advice and assistance from the defendant



*Evidence (continued).*

and her conversations with him, are competent evidence, to which the defendant could have testified as a witness, if living. *Commonwealth v. Wagner*, 265.

*Auditor's Report.*

Action of a judge as to portions of an auditor's report withdrawn from consideration of the jury because the plaintiff elected to go to the jury upon one count only of three in the declaration, and his charge as to the jury's duty to disregard the auditor's rulings of law and those of his findings of fact which were not pertinent to the counts submitted to the jury were held to show no error. *Matthews v. New York Central & Hudson River Railroad*, 10.

*Self-serving Statement.*

Statement by a railroad corporation in a report to the Industrial Accident Board as to a fatal accident was held not to be an admission of negligence by the defendant, and was not to be excluded as a self-serving statement. *Casey v. Boston & Maine Railroad*, 529.

*Statements to Industrial Accident Board.*

Successive reports by a railroad corporation to the Industrial Accident Board of an accident causing death, made in accordance with St. 1911, c. 751, Part III, § 18, (as amended by St. 1913, c. 746, § 1,) were held properly to have been treated, at the trial of an action for the causing of the death, as one entire report filed in compliance with the statutes. *Casey v. Boston & Maine Railroad*, 529.

It also was held that a statement in the second report was not an admission of negligence by the defendant, and was not to be excluded as a self-serving statement. *Ibid.*

*Experiment.*

Experiment in the court room as to "water drip," at the trial of an action for personal injuries alleged to have been caused by the fumes of illuminating gas escaping upon the plaintiff's premises through alleged negligence of the defendant's employees in permitting two teaspoonfuls of "water drip" to run upon the cellar floor. *Powers v. Wakefield*, 565.

*Of Negligence in Preparation of Food.*

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened with such tacks. *Ibid.*

*Opinion: Experts.*

An exception to the admission of the testimony of an expert on electricity and its effect upon the human body, on the ground that the witness was not

qualified properly as an expert, was overruled where the evidence as to the qualification of the witness was rather meagre but was not wholly absent and the excepting counsel had declined to cross-examine the witness upon that subject. *Jordan v. Adams Gas Light Co.* 186.

At the trial of an indictment under R. L. c. 212, § 15, for unlawfully attempting to procure the miscarriage of a woman, the medical examiner who performed the autopsy on the body of the woman, and whose qualification as an expert is unquestioned, properly may be allowed to testify as to what in his opinion was the cause of her death. *Commonwealth v. Wagner*, 265.

It was held that, at the trial of an action for conversion of a boat, it was error to permit a witness, other than the plaintiff, to testify as to the fair market value of the use of the boat during the period of detention without its being shown that such witness had any general experience or qualification which would make his opinion admissible. *Jackson v. Innes*, 558.

#### *Failure to call Witness.*

In an action against a street railway company for personal injuries, where, at the trial, the defendant's conductor was in court but neither the plaintiff nor the defendant called him as a witness, it was held that a request by the defendant for an instruction that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident," should have been given. *London v. Bay State Street Railway*, 480.

#### *Of Agency.*

Evidence, at the trial of an action, by an administrator against copartners doing business under the name of an ice cream company, for causing the death of the plaintiff's intestate by running over him with a motor truck, which was held to warrant findings that at the time of the accident the driver of the truck was in the defendants' employ and was engaged in their business. *Buckley v. Sutton*, 504.

#### *Of Contract.*

Where work had been done on a building occupied by a corporation, a statement by a minority stockholder in the corporation, who held no office in it, that "he would see that the bill was paid," is not evidence of a new and independent agreement of the stockholder to pay the bill, and, if it were, such agreement would be without consideration. *Alexander v. Dove*, 362.

Conduct and statements of a stockholder in the corporation which occupied the building above described, which, it was held, constituted evidence warranting the submission to the jury of the question whether the stockholder made a direct agreement to pay for the work which was not a promise to pay the debt of another. *Ibid.*

Certain statements by a third person to a building contractor working on a building occupied by a corporation which it was held, in an action against this person by the contractor, could be found to constitute a direct agreement by the defendant to pay for the work which was not a promise to pay the debt of another. *Ibid.*

*Of Criminal Intent.*

Where the treasurer of an importing corporation in purchasing for the corporation foreign drafts from a bank, for the purpose of deceiving the cashier, bookkeeper and auditor of the corporation, fraudulently altered and raised the amounts of the receipts given him by the bank for the money paid for the drafts, misappropriating for himself the difference between the false amounts inserted by him and the true ones, and causing it falsely to appear that the bank had bound itself to transmit larger sums in foreign money than it had contracted to do, an intent to defraud is a necessary inference from these acts, making the alteration of the receipts forgery. *Commonwealth v. Peakes*, 449.

At the trial of an indictment for forgery and larceny by a treasurer of a corporation, it was held that it was proper on the cross-examination of the defendant to ask him, whether he intended to make the stenographer of the corporation believe that he was going to send the letter which he was dictating to her and which he afterwards destroyed, the answer called for being competent as tending to show that the defendant was acting with a fraudulent intent and not honestly. *Ibid.*

*Of Acts at Other Times.*

At the trial of an action for personal injuries sustained from being run into by a motor car owned and driven by the defendant when the plaintiff was riding a motor cycle on a highway, where the plaintiff had testified that at the time of the accident he did not have an operator's license to run a motor cycle, it was proper to exclude a question asked him on his cross-examination by the defendant, "Did you ever have an operator's license to run a motor cycle?" *Polmatier v. Newbury*, 307.

In the same case it was said that in making the decision stated above the court did not mean to intimate that the question was not excluded properly on the ground, that acts of negligence committed on other occasions than the one in question are inadmissible because they lead to collateral inquiries which would distract the jury from the issue on trial and have no logical tendency to determine it. *Ibid.*

In an action for personal injuries alleged to have resulted from negligence of the driver of a motor car, the presiding judge excluded evidence offered by the plaintiff to show, that on the morning of the day of the accident, when the defendant's wife was using the motor car, the chauffeur drove fast, the plaintiff contending that this tended to show reckless habits of the chauffeur which were known or ought to have been known to the defendant, and it was held that the evidence was excluded properly. *Flynn v. Lewis*, 550.

*Of Bad Faith.*

Additional facts, which appeared at a new trial, after exceptions taken at the first trial had been sustained, of an action against a corporation, by the administrator of the estate of a deceased injured employee who also was his alleged dependent, upon a contract of the defendant to indemnify its employees or the dependents of those killed for injury or death sustained in the course of their employment out of a fund established and maintained by the defendant for that purpose, it was held, did not show that the members

of a committee, who had power to determine the plaintiff's claim, were not employees of the company and fellow employees of the plaintiff's intestate and did not show that the committee was constituted unlawfully, that its members were parties in interest or that they acted in bad faith, and consequently it was further held that the plaintiff was not entitled to go to the jury at the new trial. *Clark v. New England Telephone & Telegraph Co.* 548.

#### *Of Judicial Action.*

Docket entries of a court from which a writ of supersedeas purports to have issued and an indorsement upon the bond signed by the clerk of the court, from which, it was held, it sufficiently appeared that all proper things were done by or by direction of the court and that it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue. *Keith v. Rosnosky*, 409.

#### *Of Reckless Habits.*

In an action against the owner of a motor car for personal injuries and death of one who was a guest in the car when it was overturned by reason of negligence of the defendant's chauffeur, the presiding judge excluded evidence offered by the plaintiff to show, that on the morning of the day of the accident, when the defendant's wife was using the motor car, the chauffeur drove fast, the plaintiff contending that this tended to show reckless habits of the chauffeur which were known or ought to have been known to the defendant, and it was held that the evidence was excluded properly. *Flynn v. Lewis*, 550.

#### *Of Speed.*

Testimony of a witness at the trial of an action under the federal employers' liability act for causing the death of the plaintiff's intestate by running over him, that when the accident happened the train was late and was running "very much faster" than the witness "ever saw it go before," it was held, would not warrant a finding that the train was running at an excessive rate of speed. *Casey v. Boston & Maine Railroad*, 529.

#### *Of Value.*

The cost of a chattel often is competent evidence of its value, where there is nothing to indicate that the time of purchase was too remote for the evidence to be of assistance in determining the value. *Schneider v. Hayward*, 352.

In a suit in equity against trustees for an accounting, where it has been shown that one of the defendants, who also was a beneficiary, without justification removed to another State certain articles of personal property belonging to the trust and thus practically deprived the other beneficiaries of the opportunity of having the articles examined and appraised by experts, such defendant cannot complain rightly of the evidence of the value of the misappropriated articles to which the parties interested have been compelled to resort by the obstacles to a proper valuation of the articles voluntarily created by that defendant. *Ibid.*

It was held that, at the trial of an action for conversion of a boat, it was error to permit a witness, other than the plaintiff, to testify as to the fair market value of the use of the boat during the period of detention without its being

Evidence (*continued*).

shown that such witness had any general experience or qualification which would make his opinion admissible. *Jackson v. Innes*, 558.

### EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

In suits in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

### EXECUTION.

A writ of supersedeas, commanding the officer in whose hands an execution has been placed for service to refrain from further action thereon, takes effect from the time that the sheriff or constable in whose hands the execution has been placed for service has notice of such writ. *Keith v. Rosnosky*, 409.

An action of tort will not lie against a constable who, in serving an execution commanding him to put the owner in possession of certain premises occupied by the plaintiff and his family, removed the furniture, thus making it necessary for the plaintiff's wife and child to leave, and who in doing so "shut his fist and hollered and hollered" but did not come within striking distance of the plaintiff's wife and child. *Ibid.*

The right given to a creditor under R. L. c. 159, § 3, cl. 8, to maintain a suit in equity to reach and apply in satisfaction of a debt property conveyed by the debtor with intent to defeat, delay or defraud his creditors is concurrent with his right given by R. L. c. 178, §§ 1, 47, to levy an execution obtained against the debtor in an action at law upon land of the debtor so conveyed. *Bress v. Gersinovich*, 563.

A sale on execution after a levy on land conveyed by the debtor with intent to defeat, delay or defraud his creditors gives only a right to try the title of the defendant or fraudulent grantee by a writ of entry commenced within one year after the return day of the execution. *Ibid.*

### EXECUTOR AND ADMINISTRATOR.

The fact, that a will was contested and that it was not allowed by the Probate Court until the time fixed by St. 1909, c. 490, Part I, §§ 42, 72, 73, for the filing by the executor of a list of the taxable property of the estate for each of three successive years after the death of the testator had expired, does not give the executor, who filed no list and no petition for abatement, the right to set up an alleged excessive taxation of personal property in his hands as executor. *Collector of Taxes of West Bridgewater v. Dunster*, 291.

In such a case the executor as matter of law had sufficient excuse for delay in filing a list and asking for an abatement until after the lapse of such time subsequent to his appointment as reasonably would enable him to ascertain the nature and amount of the property held by him as executor, and he had failed to file any list or any petition in abatement after that. *Ibid.*

In an action against an executor for the collection of such a tax under the circumstances named above, where the defendant was not permitted to show in defence that the tax was excessive, it was said that, as the executor had filed no list and no petition for an abatement, it was not necessary to inquire whether the provisions of the statute fixing the times for filing a list of taxable

property and for filing a petition for abatement of a tax had any application at all to such a case. *Collector of Taxes of West Bridgewater v. Dunster*, 291. Provision in a policy of life insurance which was said to make a payment by the insurer of the amount due under the policy to the administrator of the estate of the insured a defence to a suit in equity by a creditor of the insured having an interest as an equitable pledgee of the policy. *Pettit v. Prudential Ins. Co. of America*, 394.

It also was said that, the promise in the policy above described being made to the insured, with no beneficiary named, the insurer was justified in making the payment to the administrator of his estate. *Ibid.*

It also was said that, whether the creditor described above had any equitable priority of claim to the insurance money in the hands of the administrator, could not be considered in a proceeding to which the administrator was not a party. *Ibid.*

Disallowance of a petition under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 13, as amended by St. 1914, c. 708, § 7, by an administrator of the estate of a deceased employee for compensation from the insurer for legal services rendered in connection with his appointment because it did not appear that the appointment of the administrator required for carrying out the provisions of the act was "not otherwise necessary." *Mellon's Case*, 399.

Under R. L. c. 141, § 17, (now amended by St. 1914, c. 699, § 7,) the liability of an administrator *de bonis non* in an action of contract is limited to two years after he gave notice of his appointment unless new assets have come to his hands, and where he is made a party to a pending action originally brought against a former administrator of the same estate, the action cannot be maintained unless the administrator *de bonis non* has been brought into court as a party within such two years. *Joseph S. Waterman & Sons, Inc. v. Soliday*, 422.

St. 1853, c. 156, now in substance R. L. c. 72, § 5, gives a right to the executor or administrator of the estate of a deceased partner which before the passage of the statute was unknown to the common law or in equity, and under the next section the executor or administrator of the estate of a deceased partner can maintain a suit in equity to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business. *Kelly v. Morrison*, 574.

By the statute named above the right to maintain a suit in equity to enjoin the continuance of the use of the name of a deceased partner is given only to "his legal representatives," and former partners of a firm that used the name of the deceased after his death cannot maintain such a suit. *Ibid.*

Such a suit in equity may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Ibid.*

## FALSE REPRESENTATIONS.

See DECEIT.

## FIDUCIARY.

Upon facts found by a master to whom was referred a suit in equity by a woman against her sister and her sister's husband to set aside a note and a

Fiduciary (*continued*).

mortgage given by the plaintiff to the defendants, it was held that a failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants under the circumstances to disclose to the plaintiff every material fact which affected the value of the property or which might induce or determine her action. *Fardy v. Buckley*, 377.

See also TRUST.

### FOOD.

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J.*, dissenting. *Friend v. Childs Dining Hall Co.* 65.

In an action of contract against a restaurant keeper for furnishing food to the plaintiff to be eaten on the premises which was not fit to eat, it was said that, assuming that the provision of the sales act contained in St. 1908, c. 237, § 15 (3), applied to such an action, and that, contrary to the circumstances of the case, it was the plaintiff's duty to examine the food before eating it, it would be a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered. *Ibid.*

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened by such tacks. *Ibid.*

In the case in which the points above stated were decided, it was said that no question was raised as to the contractual relation between the parties. *Ibid.*

Under the provision of the sales act contained in St. 1908, c. 237, § 15 (1), which in this respect is declaratory of the common law, a dealer who sells for food to a customer a sealed can of baked beans containing among the beans a pebble that looks like a bean, which breaks a tooth of the purchaser, can be found to be liable to the purchaser in an action of contract for his injuries thus sustained, there being in such a sale by a dealer, under the statute as at common law, an implied warranty that beans so purchased for food "shall be reasonably fit for such purpose." *CROSBY, J.*, dissenting. *Ward v. Great Atlantic & Pacific Tea Co.* 90.

It was said that it is a matter of common knowledge that pebbles often are found in raw and uncleaned beans. *Ibid.*

### FORGERY.

At a trial on an indictment for larceny and forgery, where it appears that the defendant, who was the treasurer of a manufacturing and importing corpora-

tion, by means of deceits and forgeries misappropriated for his own use sums of money belonging to the corporation, and where the defendant contends and asks the judge to rule that, if the defendant took the money in payment of a debt which the corporation owed him and acted under an honest belief that he had a legal right to resort to the methods shown by the evidence, he cannot be found guilty, it is right for the judge to instruct the jury that, if there was no debt due to the defendant from the corporation, this defence fails. *Commonwealth v. Peakes*, 449.

Where the treasurer of an importing corporation in purchasing for the corporation foreign drafts from a bank, for the purpose of deceiving the cashier, bookkeeper and auditor of the corporation, fraudulently altered and raised the amounts of the receipts given him by the bank for the money paid for the drafts, misappropriating for himself the difference between the false amounts inserted by him and the true ones, and causing it falsely to appear that the bank had bound itself to transmit larger sums in foreign money than it had contracted to do, an intent to defraud is a necessary inference from these acts, making the alteration of the receipts forgery. *Ibid.*

Even if the treasurer committing these acts believed that he had a right to resort to forgery and other illegal acts in collecting a debt which he claimed that the corporation owed him, such belief does not deprive the forgery of its criminal character nor excuse its commission. *Ibid.*

In the same case it was held that the false and fraudulent making or alteration of receipts for foreign drafts, which were described properly in the indictment as being each "an accountable receipt for money," constituted forgery within the meaning of R. L. c. 209, § 1. *Ibid.*

The "intent to injure or defraud" which is included in the definition of forgery contained in R. L. c. 209, § 1, is a general intent to defraud any one in accordance with R. L. c. 218, § 30. *Ibid.*

An alleged authorization by the president of the corporation of such fraudulent forging and alteration of the receipts of the bank could not affect the character of the acts, because no such authority could be given. *Ibid.*

In the same case the exclusion of the testimony of the cashier of a certain bank, offered for the purpose of showing that the bank had held certain notes which were signed by the defendant and were indorsed by the president of the corporation, was held to have been proper, the notes not being produced in court and the witness stating that he did not know the signature of the president of the corporation. *Ibid.*

In the same case it was held that it was proper on cross-examination of the defendant to ask him, whether he intended to make the stenographer of the corporation believe that he was going to send the letter which he was dictating to her and which he afterwards destroyed, the answer called for being competent as tending to show that the defendant was acting with a fraudulent intent and not honestly. *Ibid.*

Where the treasurer of a corporation knowingly and designedly obtains money of the corporation, whose treasurer he is, by the use of forged receipts and other wrongful acts, this constitutes larceny under R. L. c. 208, § 26. *Ibid.*

#### FRAUD.

Purpose and conduct of an administrator in prosecuting to a decree a petition under R. L. c. 146, § 18, as amended by St. 1907, c. 236, (St. 1917, c. 296,



Fraud (*continued*).

not then having been enacted,) for leave to sell the whole of the land of the intestate for purposes of distribution to a person named by him for a price greatly below its value, after the heirs had sold all the land in question to other persons and had no interest therein remaining, were held to constitute a fraud upon the court, so that, upon a petition of successors in title to grantees from the heirs of different portions of the land, filed eight months after the entry of the decree, the Probate Court properly might revoke such decree. *Child v. Clark*, 3.

In a suit in equity involving the validity of a transfer of shares of stock in accordance with apparent authority given by a power of attorney, it was said that, even if the person to whom the power of attorney was given had been false to the plaintiff and had violated his duty toward him, that would not have affected the defendants if they had no knowledge of it and acted as reasonable men in good faith in relying upon the terms written in the power of attorney. *Warner v. Brown*, 333.

Suits in equity to relieve from results of fraud, see appropriate subtitle under EQUITY JURISDICTION.

See also DECEIT.

#### FRAUDS, STATUTE OF.

The defence that an oral contract for a sale of land or an interest therein or an oral trust concerning land is within the statute of frauds under R. L. c. 74, § 1, cl. 4, or R. L. c. 147, § 1, cannot be set up by a third person, the statute of frauds being a defence only to the parties to the contract, which they are not obliged to set up unless they choose to do so. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

In an action for work, labor and materials performed and furnished on a building, where the statute of frauds is pleaded and the defence set up is that the work was performed for a corporation which occupied the building, and that the promise sued upon was an oral promise to pay the debt of another, it was held that the judge correctly instructed the jury that the plaintiff could recover only upon the theory that the defendant in the first instance agreed to pay for the work, that he bound himself to pay for it directly and that his obligation was not that of a guarantor. *Alexander v. Dove*, 362.

Conduct and statements of a stockholder in the corporation which occupied the building above described, which, it was held, constituted evidence warranting the submission to the jury of the question whether the stockholder made a direct agreement to pay for the work which was not a promise to pay the debt of another. *Ibid.*

Certain statements by a third person to a building contractor working on a building occupied by a corporation which it was held in an action against this person by the contractor, could be found to constitute a direct agreement by the defendant to pay for the work which was not a promise to pay the debt of another. *Ibid.*

Where work had been done on a building occupied by a corporation, a statement by a minority stockholder in the corporation, who held no office in it, that "he would see that the bill was paid," is not evidence of a new and independent agreement of the stockholder to pay the bill, and, if it were, such agreement would be without consideration. *Ibid.*

## FRAUDULENT CONVEYANCE.

See appropriate subtitle under EQUITY JURISDICTION.

## GRAND JURY.

See appropriate subtitle under PRACTICE, CRIMINAL.

## GUARANTY.

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## HIGHWAY.

See *WAY, Public.*

## HUSBAND AND WIFE.

A suit in equity by a married woman, seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, was dismissed because the debt secured by the mortgage was paid in full by the mortgagor to the plaintiff's husband who applied the money in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question. *Clark v. Young*, 156.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, a widow, whose husband died intestate without issue leaving an estate worth less than \$5,000, takes upon his death a vested right in his real estate as his statutory heir. *Naylor v. Nourse*, 341.

The provisions contained in St. 1905, c. 256, in regard to setting out the real estate to the widow in such a case, do not abridge nor qualify the nature of her interest. *Ibid.*

In an action against a married woman, who carried on a teaming business on her separate account, for the causing of the death of a pedestrian who was

Husband and Wife (*continued*).

run into by a motor car bought under a contract of conditional sale made in the name of the defendant's husband, it was held that it was error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could have found that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should have been left to the jury. *Goldrick v. Lacombe*, 397.

In the action above described the judge also ruled that there was not sufficient evidence that the defendant controlled the operation of the car immediately before and at the time of the accident, and, in sustaining the plaintiff's exceptions on the ground stated above, it was said that, if at a new trial the jury should find that the defendant was not the owner of the car, there was not sufficient evidence of control or of a joint enterprise to require a submission of these issues to the jury. *Ibid.*

### INCOME.

Tax on income, see appropriate subtitle under TAX.

Whether capital or income, see CAPITAL AND INCOME.

### INCOME AND CAPITAL.

See CAPITAL AND INCOME.

### INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

### INN AND INNKEEPER.

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J.*, dissenting. *Friend v. Childs Dining Hall Co.* 65.

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened with such tacks. *Ibid.*

In the case in which the points above stated were decided, it was said that no question was raised as to the contractual relation between the parties. *Ibid.*

Action against the proprietor of a hotel for causing the death of a guest by negligence in the maintenance and operation of an elevator. *Beckhold v. Rae*, 151.

## INSURANCE.

*Life.*

Where a policy of life insurance names no beneficiary and contains a provision that it shall be void "if the policy be assigned or otherwise parted with," and the insured delivers this policy to a creditor, telling her it is to secure her in case he shall not live to pay what he owes her for board, and such creditor thereafter pays the premiums on the policy until the death of the insured, this gives the creditor no right to maintain an action on the policy. *Pettit v. Prudential Ins. Co. of America*, 394.

Provision in such a policy which was said to make a payment by the insurer of the amount due under the policy to the administrator of the estate of the insured a defence to a suit in equity by a creditor of the insured having an interest as an equitable pledgee of the policy. *Ibid.*

It also was said that, the promise in the policy above described being made to the insured, with no beneficiary named, the insurer was justified in making the payment to the administrator of his estate. *Ibid.*

It also was said that, whether the creditor described above had any equitable priority of claim to the insurance money in the hands of the administrator, could not be considered in a proceeding to which the administrator was not a party. *Ibid.*

*Against Liability.*

In an action for personal injuries answers of a medical expert, called by the defendant, to a question on cross-examination, "Who asked you, doctor, to examine this woman?" "Mr. C, representing the Casualty Company of America, the manager," was held properly to have been permitted to stand, the judge instructing the jury not to take into account the fact that the defendant was insured, that this was "of absolutely no consequence." *Dempsey v. Goldstein Brothers Amusement Co.* 461.

## INTENT.

Evidence of intent and state of mind, see appropriate subtitle under EVIDENCE.

## INTEREST.

Acceptance by the holder of an overdue promissory note, which contains no express provision for the payment of interest, from indorsers of the face of the note, with an agreement that it was accepted in full satisfaction of all demands and that an entry should be made in an action against the indorsers of judgment satisfied, was held to entitle the maker of the note to an entry of judgment in his favor in an action against him, no claim of the plaintiff to recover interest from the maker being open. *Paul Revere Trust Co. v. Castle*, 129.

In an action of contract with a declaration containing four counts, purporting to set forth three causes of action, a fifth count, to recover the interest due for the failure of the defendant to meet upon demand its several obligations alleged in the other counts, sets forth no independent cause of action and a demurrer to it on this ground will be sustained. *Northampton v. Northampton Street Railway*, 540.

## INTERFERENCE.

UNLAWFUL INTERFERENCE, see that title.

## INTERSTATE COMMERCE.

By St. 1913, c. 568, unchanged by St. 1914, c. 708, § 13, amending § 2 of Part V of the workmen's compensation act by excepting from the operation of that act "masters of and seamen on vessels engaged in interstate or foreign commerce," a longshoreman employed to shovel coal in discharging the cargo of a schooner engaged in interstate commerce is not included in the exception made by the act itself. *Duart v. Simmons*, 313.

## INTOXICATING LIQUORS.

A contract to pay a man \$60 a week for delivering beer sold in part in Boston, where such sale was lawful, and sold in part in Brookline, where such sale was unlawful, is wholly void, a single consideration being paid for the lawful and the unlawful services. *Boylston Bottling Co. v. O'Neill*, 498.

At the trial of an action, in which the validity of the contract of employment of a driver for a liquor dealer under a fourth class license was involved, it was assumed by the parties that certain sales of the packages of liquor procured by the driver for his employer from a brewery and labelled by him for delivering to customers of his employer in Boston were lawful, but it was said that this assumption was wrong, as the license authorized a sale on the premises described in it and the premises described in the dealer's fourth class license were its place of business owned by it; and on the facts stated above it did not appear that the sales in Boston were made on the premises of the dealer described in its license. *Ibid*.

## INVITED PERSON.

See that subtitle under NEGLIGENCE.

## JOINT TENANTS AND TENANTS IN COMMON.

On an appeal from a decree made by a judge of the Superior Court establishing a lien under St. 1909, c. 490, Part II, §§ 74, 75, for the amount of the respondent's proportion of taxes on certain real estate which had been paid by the petitioner as cotenant and ordering a sale of the respondent's interest in the real estate, a memorandum of decision made by the judge is not a part of the record, and, if printed with the record of the appeal, it must be disregarded by this court. *Naylor v. Nourse*, 341.

## JOINT TORTFEASORS.

In an action against one of two joint tortfeasors, it appeared that before the action was brought the plaintiff had brought an action for her injuries against the other tortfeasor, which she discontinued under an agreement by which she covenanted with the landowner not to sue him and received from him the sum of \$1,500, the instrument reciting that it did not release the

plaintiff's cause of action against any one other than the landowner, and it was pointed out that the defendant, not being a party to the instrument, could introduce oral evidence to show that the plaintiff accepted the money in release of all claims against her employer. *O'Neil v. National Oil Co.* 20. In the above case it also was pointed out that, although there was evidence which would have warranted such a finding this was a question of fact for the jury and that they had a right to find that the money was not accepted for this purpose. *Ibid.*

Under the circumstances in the same case, where the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *Ibid.*

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury, but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release. *Purchase v. Seelye*, 434.

### JUDGMENT.

An order of the Superior Court dismissing a petition under R. L. c. 51, §§ 15, 16, for the assessment of damages caused to the petitioner's land by repairs upon a public way on which the land abuts, made on the ground that no petition for compensation had been filed with the mayor and aldermen "after the commencement and within one year after the completion of the work" which caused the alleged damage, as required by the statute, is not a bar to a new petition for damages to the petitioner's land caused by the same repairs, which is filed after a compliance with the requirements of the statute. *Warner v. Pittsfield*, 138.

In an action in the Superior Court for alleged breach of a contract in writing to employ the plaintiff as a salesman for one year at a salary payable weekly and a further compensation at the end of the term, the defendant set up the alleged defence that the plaintiff broke his contract and that the defendant discharged him rightly for that reason, but it was held that this issue was *res judicata* against the defendant by a judgment of the Municipal Court of the City of Boston in favor of the plaintiff in an action upon an account annexed, the first three items being for weekly instalments of salary, wherein the judge of the Municipal Court had found that the plaintiff was discharged by the defendant without justification. *Dalton v. American Ammonia Co.* 430.

### JURISDICTION.

A longshoreman who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters has received a maritime injury in maritime work and,

Jurisdiction (*continued*).

under the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the provisions of the workmen's compensation act do not apply to him. *Duart v. Simmons*, 313.

EQUITY JURISDICTION, see that title.

## JURY AND JURORS.

Informal exercise by a judge of his discretion in excusing a juror, whose conduct seemed to him to show that the plaintiffs would not have a fair trial if he remained a member of the panel, was held not to be prejudicial to the defendant. *Matthews v. New York Central & Hudson River Railroad*, 10.

In an action against a street railway company for personal injuries, where the judge sufficiently and accurately had stated to the jury the relative rights of a pedestrian on a highway and of a street railway company operating a car upon its tracks on the highway, it was held that this subject was covered sufficiently by the judge's charge and that it was the duty of the jury to consider the particular circumstances of the case as shown by the evidence to have existed at the time of the accident, as they correctly were told to do by the judge. *Sawyer v. Worcester Consolidated Street Railway*, 215.

Presumption that instructions by the trial judge were followed by the jury. *Dempsey v. Goldstein Brothers Amusement Co.* 461.

An indictment found and returned by a grand jury upon testimony given before them by witnesses in the presence of other witnesses is a violation of art. 12 of the Declaration of Rights, although no person not a member of the grand jury was present while that body was deliberating upon the evidence presented. *Commonwealth v. Harris*, 584.

A plea in abatement to an indictment for crime on the ground that, while the grand jury were hearing testimony upon the subject matter of the indictment, other witnesses than the witness testifying were present in the grand jury room, must be sustained although it appears that such witnesses were present solely for the purpose of testifying and it is not shown that the defendant suffered any harm from their presence. *Ibid.*

## LABOR.

St. 1912, c. 706, as amended, creating the minimum wage commission and defining its powers, is constitutional. *Holcombe v. Creamer*, 99.

LABOR UNION, see that title.

## LABOR UNION.

In a suit in equity against the members of a labor union to enjoin them from interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff, if it appears that one of the purposes of the strike was an unlawful purpose, it is not necessary to consider the legality of another alleged purpose of the strike, because a strike for both a lawful and an unlawful purpose is illegal. *Baush Machine Tool Co. v. Hill*, 30.

Where, in such a suit in equity there were two hundred and fifty defendants, all members of the union, and twenty-eight notified the plaintiff of "their renunciation of their combination or conspiracy to interfere with the plain-

tiff's business" for the purpose of unionizing the plaintiff's shop and their aiding or abetting the strike against the plaintiff for that purpose, but did not leave the union nor announce a purpose of doing so, and their notice contemplated that the unlawful strike should continue in force and it did so continue, it was held that the motive for the twenty-eight continuing to be parties to an unlawful strike was immaterial and afforded no ground why they should not be enjoined with the other two hundred and twenty-two defendants from maintaining the unlawful strike. *Baush Machine Tool Co. v. Hill*, 30.

In the same case it was pointed out that, as the strike was for an unlawful purpose, it was not necessary to consider whether the means employed by the defendants were lawful or unlawful. *Ibid*.

In an action by a building contractor against the members of a bricklayers' union for damages resulting from a conspiracy against the plaintiff and malicious interference with his business, in sending out a notice, in pursuance of a common purpose agreed upon by them in combination, that union masons would not work for the plaintiff until further notice as he "has been working Non Union Masons," the statement being false, it was held that the plaintiff was entitled to go to the jury. *Martineau v. Foley*, 220.

In the same case it also was held that the sending out of the false statement with intent to destroy the plaintiff's business was malicious within the legal meaning of that word, being without legal justification, and entitled the plaintiff to recover substantial damages from each defendant who participated in the conspiracy irrespective of the degree of his activity in the wrongful acts. *Ibid*.

#### LACHES.

See that subtitle under EQUITY JURISDICTION.

#### LANDLORD AND TENANT.

##### *Construction of Lease and Covenants.*

Construction of a covenant by the lessor in a lease of one of several stores in a building of the lessor, that during the term of the lease she would not rent any part of the building on premises in which the stores were located for any grocery, provision, meat or fish business, "except the Cloverdale Store now located at No. 431 Park Avenue," was held to have been broken when, upon the vacating of 431 Park Avenue, the lessor executed a lease of that store to another corporation for the sale of provisions, meats, groceries and fish. *Strates v. Keniry*, 426.

In the same case it was said that, the Cloverdale Company having ceased to occupy any store in the defendant's building, it was not necessary to consider, whether the words "Cloverdale Store" in the excepting clause of the covenant referred to the business then carried on by the Cloverdale Company at No. 431 and would authorize a transfer of that business to another store in the defendant's building. *Ibid*.

##### *Tenant for Life.*

One who has an interest in land as a tenant for life in expectancy is entitled to redeem the land from a tax sale. *Isbell v. Greylock Mills*, 233.



*Quiet Enjoyment.*

A widow, whose husband had devised and bequeathed to her all his property "for her natural life, with power to sell or mortgage said property if she considers it necessary," leaving the remainder to his children upon her death, was held thereby to have power to make a lease of certain real estate that had belonged to her husband, so that the tenant might maintain a suit in equity against the children of the testator to enjoin them from interfering with his quiet enjoyment of the property. *Wolff v. O'Brien*, 487.

*Dispossession.*

An action of tort will not lie against a constable who, in serving an execution commanding him to put the owner in possession of certain premises occupied by the plaintiff and his family, removed the furniture, thus making it necessary for the plaintiff's wife and child to leave, and who in doing so "shut his fist and hollered and hollered" but did not come within striking distance of the plaintiff's wife and child. *Keith v. Rosnosky*, 409.

*Landlord's Liability for Injuries to Tenant, or to his Invitee or Licensee.*

Action for personal injuries received by one in an office building on business with a tenant and injured when the elevator fell, due to a defective safety device. *Draper v. Cotting*, 51.

In an action by a woman, who occupied with her husband the top floor of a three-story apartment house, against the owner of the house for personal injuries caused by the giving way of a step forming part of a "bulkhead" stairway leading from the yard of the house to the cellar as a common stairway for the use of all the tenants, it was held that there was evidence for the jury of the defendant's negligence. *Oles v. Dubinsky*, 447.

In the action above described it also was held that, upon the evidence, it could be found that the defect which caused the plaintiff's injury was not an obvious one and that under St. 1914, c. 553, the question of the plaintiff's negligence was for the jury. *Ibid.*

## LARCENY.

Where the treasurer of a corporation knowingly and designedly obtains money of the corporation, whose treasurer he is, by the use of forged receipts and other wrongful acts, this constitutes larceny under R. L. c. 208, § 26. *Commonwealth v. Peakes*, 449.

It is no defence to an indictment for such acts of larceny that the treasurer in committing the acts was attempting to collect a claim that he had against the corporation, where it appears that the defendant's alleged claim was not created by any one authorized to bind the corporation, that it was designedly kept off the books of the corporation, that it was tainted with fraud in its origin and apparently was barred by the statute of limitations. *Ibid.*

In the same case it was held that, on evidence of an intent of the defendant to deprive the corporation permanently of its money, the defendant could be found guilty of larceny, although the motive that induced him to steal from his employer was a desire to accomplish the payment of a debt which he claimed to be due to him and although he believed that his conduct was justified by this purpose. *Ibid.*

In the same case it was held that it was proper on the cross-examination of the defendant to ask him, whether he intended to make the stenographer of the corporation believe that he was going to send the letter which he was dictating to her and which he afterwards destroyed, the answer called for being competent as tending to show that the defendant was acting with a fraudulent intent and not honestly. *Commonwealth v. Peakes*, 445.

In the same case the exclusion of the testimony of the cashier of a certain bank, offered for the purpose of showing that the bank had held certain notes which were signed by the defendant and were indorsed by the president of the corporation, was held to have been proper, the notes not being produced in court and the witness stating that he did not know the signature of the president of the corporation. *Ibid*.

At a trial on an indictment for larceny and forgery, where it appears that the defendant, who was the treasurer of a manufacturing and importing corporation, by means of deceptions and forgeries misappropriated for his own use sums of money belonging to the corporation, and where the defendant contends and asks the judge to rule that, if the defendant took the money in payment of a debt which the corporation owed him and acted under an honest belief that he had a legal right to resort to the methods shown by the evidence, he cannot be found guilty, it is right for the judge to instruct the jury that, if there was no debt due to the defendant from the corporation, this defence fails. *Ibid*.

#### LAW OF THE CASE.

Where a case comes before this court for a second time the decision of this court at the previous stage of the case is the law of the case and is not open to question upon any of the points of law then passed upon. *Clark v. New England Telephone & Telegraph Co.* 546.

#### LEGACY.

See DEVISE AND LEGACY.

#### LICENSE.

Regulation by a town of the use of motor vehicles carrying passengers for hire which was held to be valid under St. 1916, c. 293. *Commonwealth v. Theberge*, 386.

At the trial of an action, in which the validity of the contract of employment of a driver for a liquor dealer under a fourth class license was involved, it was assumed by the parties that certain sales of the packages of liquor procured by the driver for his employer from a brewery and labelled by him for delivering to customers of his employer in Boston were lawful, but it was said that this assumption was wrong, as the license authorized a sale on the premises described in it and the premises described in the dealer's fourth class license were its place of business owned by it; and on the facts stated above it did not appear that the sales in Boston were made on the premises of the dealer described in its license. *Boylston Bottling Co. v. O'Neill*, 498.

#### LIEN.

MECHANIC'S LIEN, see that title.

### LIMITATIONS, STATUTE OF.

- A note payable on demand, with an indorsement signed by the maker: "This is a preferred note to be paid regardless of any future proceedings in Bankruptcy on demand, or at the settlement of my mother's (M A S) estate," was held to include, in addition to the promise to pay the principal sum on demand, alternative promises of payment, one to pay on demand regardless of any future proceedings in bankruptcy and the other to pay on the settlement of the defendant's mother's estate. *McQueen v. Spalding*, 301.
- It also was held that the plaintiff had the right to elect upon which of these promises to rely, and that he had elected to rely on the promise of the defendant to pay on the settlement of his mother's estate, so that the statute of limitations began to run only from the time of such settlement. *Ibid*.
- Under R. L. c. 141, § 17, (now amended by St. 1914, c. 699, § 7,) the liability of an administrator *de bonis non* in an action of contract is limited to two years after he gave notice of his appointment unless new assets have come to his hands, and where he is made a party to a pending action originally brought against a former administrator of the same estate, the action cannot be maintained unless the administrator *de bonis non* has been brought into court as a party within such two years. *Joseph S. Waterman & Sons, Inc. v. Soliday*, 422.
- Suit in equity under R. L. c. 72, § 5, to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Kelly v. Morrison*, 574.

### LONGSHOREMAN.

- By St. 1913, c. 568, unchanged by St. 1914, c. 708, § 13, amending § 2 of Part V of the workmen's compensation act by excepting from the operation of that act "masters of and seamen on vessels engaged in interstate or foreign commerce," a longshoreman employed to shovel coal in discharging the cargo of a schooner engaged in interstate commerce is not included in the exception made by the act itself. *Duart v. Simmons*, 313.
- A longshoreman who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters has received a maritime injury in maritime work and, under the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the provisions of the workmen's compensation act do not apply to him. *Ibid*.
- In an action by a longshoreman against the proprietors of a schooner engaged in interstate commerce for personal injuries received when the plaintiff, in the employ of an independent contractor, was unloading a cargo of coal from the hold of the schooner when lying in navigable waters, where such proprietor of the schooner was a subscriber under the workmen's compensation act, the defendant cannot set up in defence, that the plaintiff has waived his right of action at common law by having failed to give notice under St. 1911, c. 751, Part I, § 5, that he claimed his right of action at common law. *Ibid*.
- In such an action at common law brought by a longshoreman injured in the

manner above described there was evidence of his due care in addition to the presumption created by St. 1914, c. 553, and it was held that the question, whether the defendant had shown that negligence of the plaintiff contributed to his injury, was for the jury. *Duart v. Simmons*, 313.

### LORD'S DAY.

Upon the evidence at the trial of an action upon a contract for the installation of an irrigation system in which the defendant alleged in defence that the contract was void because made on the Lord's day, where it appeared that an oral agreement was made on a Sunday and that on the next day the plaintiff's agent wrote to the defendant a letter beginning, "We wish to confirm agreement which we reached yesterday," and that the plaintiff in good faith went forward with the installation of the plant, doing all the work on secular days, it was held that a finding was warranted that the installation was done under a contract made on Monday. *Skinner Irrigation Co. v. Burke*, 555.

It also was held that an inspection and test performed by the plaintiff on a Sunday after the work was completed did not affect the plaintiff's right to recover. *Ibid.*

It also was held proper to refuse to grant a request for a ruling that "The offer contained in the letter of the plaintiff to the defendant of . . . [Monday] . . . not having been accepted by the defendant only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover." *Ibid.*

### MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

### MANDAMUS.

In a petition by certain laborers to compel certain city officers to approve the payment of an increase in wages in accordance with a vote of the city council which was void because in violation of the municipal indebtedness act, it was said that, as the petition must be dismissed, it was not necessary to consider whether, if the petitioners had been entitled to the wages claimed by them, they could have sued for such wages in actions of contract so that they would not have needed, nor have been entitled to, the writ of mandamus sought. *Shannon v. Mayor of Cambridge*, 322.

Petition for a writ of mandamus to compel a town to subscribe for shares in a corporation as the selectmen had been authorized to do in its behalf, was not granted because the selectmen were given discretion in the matter. *Plymouth & Sandwich Street Railway v. Plymouth*, 535.

### MARRIED WOMAN.

See HUSBAND AND WIFE.

### MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

## MECHANIC'S LIEN.

Upon a petition to establish a mechanic's lien for work and materials under R. L. c. 197, it appeared that the work and materials were furnished under a contract in writing "for the construction of a First-class Low Pressure Steam Heating Apparatus," and that the statement of lien was filed in the registry of deeds within thirty days after the completion of changes ordered by the State boiler inspector, and it was held that the work upon the changes was required for the completion of the petitioner's contract, and that he was entitled to have his lien established. *Winer v. Rosen*, 418.

## MEMORIAL.

Presentation and recording of a memorial of Chief Justice Marcus Perrin Knowlton, 615.

## MINIMUM WAGE COMMISSION.

The provisions of the statute creating the minimum wage commission, contained in St. 1912, c. 706, as amended, which are not mandatory as to rates of wages, contain no words of compulsion either upon employer or employee and do not restrain freedom of action by either employer or employee as to the wages to be paid or received, are not in violation of any of the articles of the Declaration of Rights nor in violation of the Fourteenth Amendment to the Constitution of the United States. *Holcombe v. Creamer*, 99.

The provisions of the statute creating the minimum wage commission in no way exceed the limits of the right of the public to inquire into private affairs. *Ibid.*

Nor are the provisions of that statute open to objection as an unconstitutional delegation of legislative power. *Ibid.*

The facts which the minimum wage commission is authorized to ascertain and the evidence which it is empowered to seek from employers cannot form the basis of a criminal proceeding, because no crime is created and no prosecution is provided for. *Ibid.*

It here was unnecessary to consider the provisions relating to newspapers contained in St. 1912, c. 706, §§ 15, 16, of the statute creating the minimum wage commission, because those provisions were not before the court, but it was pointed out, that, even if those provisions should be found to transcend in any way the power of the Legislature under the Constitution, they are quite separable from the rest of the statute. *Ibid.*

It also was said that the grounds on which the decision was based made it wholly unnecessary to consider the question, whether a mandatory minimum wage law would violate the provisions of our Constitution or the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

## MONOPOLY.

In a suit in equity by one of the stockholders of a trading stamp corporation, which had conducted a monopolistic business in violation of St. 1908, c. 454, against the corporation and the other parties to the enterprise, it was said that, "The theory of the law is that general morality and business integrity

are best promoted by not undertaking to aid repentant participants in executed illegal transactions" and by leaving them without remedy against one another. *Duane v. Merchants Legal Stamp Co.* 113.

No federal question was raised when this case was a second time before this court, and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Ibid.*

*Duane v. Merchants Legal Stamp Co.* 227 Mass. 466, affirmed and declared not to be distinguishable from *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393. *Ibid.*

## MORTGAGE.

### *Of Personal Property.*

Where a mortgage of chattels provided that the mortgagor in case of foreclosure should be notified in the manner provided by R. L. c. 198, § 5, "of the time and place of any such sale to be made in foreclosure proceedings, at least seven days before such sale," it was held that a notice of a sale to be on July 10, published on June 30, July 2 and July 9, the sale on July 10 being continued to July 13 and then made, was sufficient and that the sale was valid, so that the mortgagor could not maintain an action of conversion against the auctioneer. *Freed v. Rosenthal*, 357.

In the case above described it also was held that the defendant auctioneer had a right in the exercise of a sound discretion to adjourn the sale and that the adjourned sale when made was in effect the sale of which previous notice had been given. *Ibid.*

In the same case it was said that, although the auctioneer published a notice of the adjourned sale, he was under no legal obligation to do so, provided he acted reasonably and in good faith. *Ibid.*

In the case above described it also was said that, so far as the parties to the mortgage, in fixing the kind and the manner of service of the notice required by their agreement, adopted the provisions of R. L. c. 198, § 5, in relation to notice, there appeared to have been a compliance with the terms of the statute. *Ibid.*

In an action of replevin against the mortgagee of a chattel which the plaintiff has the right to redeem upon a proper payment or tender, it seems that a tender made at the time that the chattel is taken upon the replevin writ comes too late, as the writ already has been issued, and in the present case, where there was a previous valid tender, a further tender at the time of the service of the writ was disregarded by this court. *Pokross v. Champagne*, 391.

Where, for the purpose of redeeming a motor car from a mortgage, the mortgagor attempts to pay, not only the amount of the mortgage debt and interest, but also the amount of a bill for painting the car which the mortgagor has agreed to pay, but the mortgagee, in order to prevent the redemption, himself pays the painter's bill, which he does not owe, before the mortgagor can get a chance to pay it, this may be found to be a waiver by the mortgagee of the payment of the painter's bill by the mortgagor, and the tender by the mortgagor of the principal and interest of the debt entitles him to redemption. *Ibid.*

*Of Real Estate.*

Upon facts found by a master to whom was referred a suit in equity by a woman against her sister and her sister's husband to set aside a note and a mortgage given by the plaintiff to the defendants, it was held that a failure of the defendants, who stood toward the plaintiff in a relation of trust and confidence, to disclose to the plaintiff the price that they recently had paid for the house entitled the plaintiff to relief, it having been the duty of the defendants under the circumstances to disclose to the plaintiff every material fact which affected the value of the property or which might induce or determine her action. *Fardy v. Buckley*, 377.

In the case above described a master found "that the defendants did not fraudulently conceal any material fact from the plaintiff and did not make any false or fraudulent statements to her," and it was held that, in view of the other facts found, this finding was immaterial, as, where such fiduciary relations exist, the duty to disclose does not depend on the motives or intentions of the persons whose duty it is to make the disclosure. *Ibid.*

In the same case it was held that it also was irrelevant that the property might have been worth at the date of the sale more than the plaintiff paid for it. *Ibid.*

A suit in equity by a married woman, seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, was dismissed because the debt secured by the mortgage was paid in full by the mortgagor to the plaintiff's husband who applied the money in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question. *Clark v. Young*, 156.

In the same suit it was held that, whether or not renewals of the plaintiff's notes to the trust company, which were paid with the money received from the defendant, were made in her name by her husband without her authority was immaterial. *Ibid.*

In a suit in equity by a mortgagee of real estate for the cancellation of a discharge of the plaintiff's unpaid mortgage which had been entered by mistake on the margin of the record in the registry of deeds, it appeared that two of the defendants had attached the real estate after the apparent discharge of the mortgage on the record and without knowledge of the mistake, and it was held that the bill must be dismissed as to the defendant attaching creditors, whose liens took precedence to the plaintiff's mortgage. *Waltham Co-operative Bank v. Barry*, 270.

Under U. S. St. 1918, c. 20, § 302, cl. 2, no sale of land under a power of sale in a mortgage is valid if made during the military service of the owner of the land or within three months thereafter unless such sale is ordered by the court. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

The fact, that an agent of a person in the military service of the United States, who had charge of land beneficially owned by such person subject to a mortgage, had full knowledge of a foreclosure sale and acquiesced in and actively approved of it, does not deprive such military owner of his right given by U. S. St. 1918, c. 20, § 302, because the right is a personal one which cannot be waived by an agent. *Ibid.*

Assuming that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a mortgage of real estate con-

taining a power of sale, the existence of the soldiers' and sailors' civil relief act is a special circumstance which gives the courts of equity in this Commonwealth jurisdiction to foreclose such mortgages made within the time specified in the act. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

In this Commonwealth, where the grantee in a deed assumes and agrees to pay a mortgage on the property conveyed, he becomes as between himself and his grantor the principal debtor for the payment of the mortgage debt assumed by him, and the mortgagor as to the grantee becomes a surety, although this does not bind the mortgagee unless he assents to it. *Codman v. Deland*, 344.

But, if thereafter the mortgagee, without the assent or knowledge of the mortgagor, makes an agreement in writing under seal with the grantee extending the time of payment of the mortgage note at an increased rate of interest, the mortgagee by such agreement accepts the grantee as the principal debtor and the mortgagor as a surety and, by the agreement to extend the time of payment contained in the same instrument, made without the knowledge of the mortgagor, discharges the mortgagor from his liability as surety. *Ibid*.

#### MOTOR VEHICLE.

Lack of license to operate a motor vehicle as evidence. *Palmatier v. Newbury*, 307.

A town which has accepted St. 1916, c. 293, giving authority to license motor vehicles carrying passengers for hire, may pass a regulation requiring a license fee and a deposit of security by bond or otherwise with the town treasurer for "jitneys," which pass through the town without taking on or letting off passengers there, as well as for vehicles whose "fixed and regular termini" are within the town limits. *Commonwealth v. Theberge*, 386.

In such a regulation a nominal license charge of \$1 is a fee and not a tax on property. *Ibid*.

In such a regulation the requirement of the deposit with the town treasurer of a bond in the penal sum of \$2,500 is not unreasonable. *Ibid*.

Replevin of a motor vehicle held by the defendant as mortgagee and wrongly detained by him after a tender by the plaintiff sufficient to effect redemption. *Pokross v. Champagne*, 391.

In an action against a married woman, who carried on a teaming business on her separate account, for the causing of the death of a pedestrian who was run into by a motor car bought under a contract of conditional sale made in the name of the defendant's husband, it was held that it was error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could have found that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should have been left to the jury. *Goldrick v. Lacombe*, 397.

See also NEGLIGENCE, *Motor Vehicle*.



## MUNICIPAL CORPORATIONS.

### *Municipal Indebtedness Act.*

Under the provisions of the municipal indebtedness act which relate to an annual budget of current expenses in cities other than Boston governed by a mayor and a city council, contained in St. 1913, c. 719, § 20, orders and ordinances, adopted by the city council of such a city without the approval of the mayor, purporting to increase the compensation of firemen and policemen beyond the amounts provided for by the budget, are void. *Flood v. Hodges*, 252.

In the provision, contained in the statute named above, that "In case of the failure of the mayor to transmit in writing to the city council a recommendation for an appropriation of money for any purpose deemed by the council to be necessary, and after having been so requested by vote of the city council, said council, after the expiration of seven days after such vote, upon its own initiative, may make an appropriation for such purpose by a vote of at least two thirds of its members," the words "any purpose" mean any purpose other than those already included in the annual and supplementary budgets submitted by the mayor. *Ibid.*

The unequivocal limitation placed by the statute upon the power of initiative by the city council of such a city in making appropriations is not to be defeated by a vote requesting action by the mayor or by an amendment to ordinances establishing such expenditures or by the enactment of an ordinance attempting to deprive the mayor of his prerogative under such a city charter of approving drafts or warrants before money can be withdrawn from the city treasury. *Ibid.*

The mayor, the superintendent of streets and the auditor of a city that has adopted the Plan B form of government provided for in St. 1915, c. 267, Part III, subject to St. 1913, c. 719, called the municipal indebtedness act, are right in refusing to approve the alleged wages of certain city laborers claimed by them under an ordinance attempted to be passed by the city council raising the rate of the wages of the classes of laborers in question beyond the amount provided for by the budget for the fiscal year in violation of § 20 of the municipal indebtedness act. *Shannon v. Mayor of Cambridge*, 322.

In a petition by certain laborers to enforce such approval, it was said that, as the petition must be dismissed, it was not necessary to consider whether, if the petitioners had been entitled to the wages claimed by them, they could have sued for such wages in actions of contract so that they would not have needed, nor have been entitled to, the writ of mandamus sought. *Ibid.*

### *By-Laws and Ordinances.*

The Commonwealth, which has power to regulate the use of the State highways, can delegate the administration of such powers to cities and towns which under St. 1917, c. 344, Part I, §§ 17, 21, contribute toward the repair and maintenance of the State highways and are given police jurisdiction over them. *Commonwealth v. Theberge*, 386.

A town which has accepted St. 1916, c. 293, giving authority to license motor vehicles carrying passengers for hire, may pass a regulation requiring a license fee and a deposit of security by bond or otherwise with the town

treasurer for "jitneys," which pass through the town without taking on or letting off passengers there, as well as for vehicles whose "fixed and regular termini" are within the town limits. *Commonwealth v. Theberge*, 386.

In such a regulation a nominal license charge of \$1 is a fee and not a tax on property. *Ibid.*

In such a regulation the requirement of the deposit with the town treasurer of a bond in the penal sum of \$2,500 is not unreasonable. *Ibid.*

#### *Officers and Agents.*

Effect of the restrictions placed by the municipal indebtedness act, St. 1913, c. 719, § 20, upon the initiative of the city council in cities other than Boston. *Flood v. Hughes*, 252.

Proper refusal of officers of the city of Cambridge to recognize the validity of an ordinance increasing certain salaries in violation of the municipal indebtedness act. *Shannon v. Mayor of Cambridge*, 322.

A vote passed by a town authorizing the selectmen to subscribe for or purchase shares of the capital stock of a certain street railway corporation and that "such subscription or purchase shall not be made by the selectmen until they are satisfied that the balance of the amount necessary for the construction and equipment of said road is fully provided for," is not of the class of votes giving authority to do an act which are to be construed as directing that the act shall be done. *Plymouth & Sandwich Street Railway v. Plymouth*, 535.

Where the selectmen of the town, acting under this vote in good faith, after consideration of the situation, were not satisfied that the railway corporation had fully provided for the "balance of the amount necessary" within the terms of the vote, and refused to make the subscription when requested to do so by the railway corporation, the railway corporation cannot maintain a petition for a writ of mandamus to compel the town to make the subscription. *Ibid.*

The board of aldermen of a city, in granting to a street railway corporation under the authority given by St. 1874, c. 29, § 11, Pub. Sts. c. 113, § 21, an extension of the location of its tracks in that city and imposing a certain condition as to repair of such portions of the streets, roads and bridges, respectively, as are occupied by its tracks were to act as public officers and not as agents of the city, so that the acceptance of the location by the street railway corporation did not constitute a contract of the corporation with the city that it would comply with the conditions of the grant. *Northampton v. Northampton Street Railway*, 540.

#### *Defects in Ways.*

Liability of municipalities for defects in highways, see appropriate subtitle under **WAT.**

#### *Referendum.*

In making legislative provision for the apportionment of public burdens among different municipalities, although it has been the custom of the General Court usually to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, this has

Municipal Corporations (*continued*).

not always been done and it is not necessary under the Constitution. *Opinion of the Justices*, 603.

*Payment by Municipality of Excess Cost of Governmental Operation of Public Utility.*

Constitutionality of Spec. St. 1918, c. 159, and of certain proposed legislation providing in substance for the temporary operation, by trustees appointed by the Governor, of the lines of the Boston Elevated Railway Company and the payment of deficiencies thereby arising and of dividends to stockholders by taxation and assessments upon municipalities chiefly interested. *Opinion of the Justices*, 603.

## MUNICIPAL COURT OF THE CITY OF BOSTON.

Where in a report made by a judge of the Municipal Court of the City of Boston to the Appellate Division of that court certain findings of fact are stated but all the evidence is not reported, the findings of the judge must be accepted; and this is true of his findings which, although not stated expressly, are necessarily involved in the rulings and findings made by him. *Freed v. Rosenthal*, 357.

## NAME.

St. 1853, c. 156, now in substance R. L. c. 72, § 5, gives a right to the executor or administrator of the estate of a deceased partner which before the passage of the statute was unknown to the common law or in equity, and under the next section the executor or administrator of the estate of a deceased partner can maintain a suit in equity to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business. *Kelly v. Morrison*, 574.

By the statute named above the right to maintain a suit in equity to enjoin the continuance of the use of the name of a deceased partner is given only to "his legal representatives," and former partners of a firm that used the name of the deceased after his death cannot maintain such a suit. *Ibid*.

Such a suit in equity may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Ibid*.

## NEGLIGENCE.

*Degrees of Negligence.*

Statement by Rugg, C. J., of the rules in regard to negligence, gross negligence and wilful, wanton and reckless conduct. *Altman v. Aronson*, 588.

*Contributory Negligence.*

Of a guest at a hotel injured in an elevator. *Bechtold v. Rae*, 151.

Of pedestrians on a highway at night run into by a motor vehicle. *Emery v. Miller*, 243.

Of one driving a motor cycle without a license. *Polmatier v. Newbury*, 307.

Of a longshoreman when unloading a ship. *Duart v. Simmons*, 313.

Of a woman crossing a street diagonally and struck by a delivery wagon from behind. *Seabut v. Ward Baking Co.* 339.

Of an inventor, in a foundry by invitation, who fell into a well in the floor. *Blood v. Ansley*, 438.

Of a tenant injured by the giving way of a step on the premises. *Oles v. Dubinsky*, 447.

Of a boy who, after he got off a truck and started to walk in a diagonal direction to his left across the street, was struck by a motor truck approaching from behind, which turned to the left to go by the one in front of it. *Buckley v. Sutton*, 504.

Of a boy who, after he had climbed over a gate, was injured by its falling on him. *Barber v. C. W. H. Moulton Ladder Co.* 507.

On the evidence at the trial of an action against a street railway corporation for personal injuries caused by a collision between an electric street railway car of the defendant and a motor car driven by the plaintiff, when the plaintiff had backed his car from a garage on a city street across the sidewalk and into the street and was in the act of turning his car to go forward on the street when it was struck by the street railway car of the defendant, it was held that under St. 1914, c. 553, it could not be ruled as matter of law that the defendant had proved that the plaintiff was negligent. *Gagnon v. Worcester Consolidated Street Railway*, 160.

In the same case it was said that, although it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, yet he well might rely to some extent on the expectation that the motorman would act with due regard to the safety of others lawfully using the street. *Ibid.*

In an action against the owner and operator of a motor car for causing the death of a boy sixteen years of age, who was standing in the street with another boy watching a concrete mixing machine which was being operated when he was struck by the defendant's car, it was held that on the facts which could have been found upon the evidence, it could not be ruled as matter of law that the plaintiff's intestate was negligent. *Sarmiento v. Vance*, 310.

In the same case it was said that it was not necessary to consider, whether, if the accident had happened before the enactment of St. 1914, c. 553, there would have been evidence to warrant a finding that the intestate was actively in the exercise of due care. *Ibid.*

On the evidence at the trial of an action by a policeman against the owner and driver of a motor vehicle for personal injuries received when the plaintiff was struck by the vehicle just after he had alighted at night from a street car, it was held that it could not have been ruled as matter of law that the plaintiff was negligent. *Hartnett v. Tripp*, 382.

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate while in the exercise of due care by the negligence of the defendant's servant, the presumption created by St. 1914, c. 553, is commensurate with the degree of care required by law of the intestate in order that the plaintiff may recover damages. *Powers v. Loring*, 458.

Where one leading two horses on a much travelled highway at half past six o'clock on a pleasant but dark October evening was walking at the left of the horses and was himself on the right of the middle of the way, carrying

*Negligence (continued).*

no lantern, when he was struck and killed by a motor car approaching from behind and driven at the rate of twenty-five miles an hour, in an action for causing his death it cannot be ruled under St. 1914, c. 553, that he was negligent as matter of law. *Powers v. Loring*, 458.

At the trial of an action by the administratrix of the estate of a teamster for causing the death of the plaintiff's intestate by running over him with a motor truck after the enactment of St. 1914, c. 553, as he was in front of his team leading them from the yard of a contractor, into a public way, it was held that the evidence did not warrant a ruling that the burden of proving contributory negligence, placed on the defendant by St. 1914, c. 553, had been sustained, and that a finding that the plaintiff's intestate was in the exercise of due care was warranted. *Burns v. Oliver Whyte Co. Inc.* 519.

A woman, who, before the enactment of St. 1914, c. 553, walked slowly across a street railway track in front of a moving street railway car that she had seen forty feet away and which she could have seen was very near her before she walked in front of it, and was injured by being knocked down by the car, cannot maintain an action against the corporation operating the car for her injuries. *Bradley v. Bay State Street Railway*, 572.

Where, at the trial of an action for personal injuries suffered by the plaintiff after the enactment of St. 1914, c. 553, due to a fall in a building under the defendant's control in which the plaintiff was at the defendant's invitation, the only evidence shows that the premises were strange to the plaintiff and were very dark, that he knew and appreciated the degree of darkness, was in no way misled by any act or omission of the defendant and had no false sense of safety, but went ahead nevertheless and fell down steps which he did not see, a verdict must be ordered for the defendant, because the only reasonable inference to be drawn from the evidence is that negligence of the plaintiff contributed to his injury. *Benton v. Watson*, 582.

*Invited Person.*

In an action against an oil company by a housemaid for personal injuries sustained by falling into an excavation made by the defendant in land of the plaintiff's employer for the purpose of repairing a gasoline tank, it was said that, even if the plaintiff at the time of her injury was on the lawn and not on the driveway and was looking for a pear, the jury could find that the plaintiff in passing over the lawn, although not invited, was there lawfully so far as the defendant was concerned and could recover for the consequences of its negligence. *O'Neil v. National Oil Co.* 20.

The evidence at the trial of an action by an inventor of a pattern for a mechanical device against the proprietor of a foundry where he was having a casting of it moulded, for personal injuries caused by his falling into a well at the foundry was held to warrant a finding that the plaintiff was on the defendant's premises by invitation, and it was held that it could not be said as matter of law that the invitation was confined to one particular part of the foundry. *Blood v. Ansley*, 438.

On the evidence at the trial of an action by a young girl against the owner of a motor car for personal injuries caused by the negligence of the defendant's chauffeur, where it appeared that the plaintiff was being transported in the car by invitation of the defendant's daughter authorized by the defendant, it was held that the plaintiff had only the right of an invited guest who was

travelling gratuitously, and that the defendant was not liable at common law for her injuries unless they were caused by the gross negligence of his servant, the chauffeur. *Flynn v. Lewis*, 550.

Where, at the trial of an action for personal injuries suffered by the plaintiff after the enactment of St. 1914, c. 553, due to a fall in a building under the defendant's control in which the plaintiff was at the defendant's invitation, the only evidence shows that the premises were strange to the plaintiff and were very dark, that he knew and appreciated the degree of darkness, was in no way misled by any act or omission of the defendant and had no false sense of safety, but went ahead nevertheless and fell down steps which he did not see, a verdict must be ordered for the defendant, because the only reasonable inference to be drawn from the evidence is that negligence of the plaintiff contributed to his injury. *Benton v. Watson*, 582.

#### *Licensee or Trespasser.*

On the evidence at the trial of an action for personal injuries sustained when the plaintiff was eleven years of age by reason of a gate of the defendant falling upon him, where there was evidence that the plaintiff was on a private street after he had come out of the defendant's yard, it was held that it could be found that the plaintiff when injured was not a trespasser nor a mere licensee and that the defendant accordingly was required to take reasonable precautions in the maintenance and management of its gate not to injure the plaintiff when he was in this private street in the exercise of due care. *Barber v. C. W. H. Moulton Ladder Co.* 507.

In an action against an oil company by a housemaid for personal injuries sustained by falling into an excavation made by the defendant in land of the plaintiff's employer, it was said that, even if the plaintiff at the time of her injury was on the lawn and not on the driveway and was looking for a pear, the jury could find that the plaintiff in passing over the lawn, although not invited, was there lawfully so far as the defendant was concerned and could recover for the consequences of its negligence. *O'Neil v. National Oil Co.* 20.

#### *Assumption of Risk.*

Executrix of the will of a coal dealer, who went with one of his teams to deliver coal ordered by a machinery company, and, while he was standing on his wagon engaged in shovelling coal into a coal pit, was caught by his clothing and drawn to a rapidly revolving shaft with projecting nuts, which was only four and a half feet above the floor of the wagon where he was standing, receiving injuries which caused his death, was held not to be entitled to maintain an action against the machinery company for causing his death. *Hunt v. Economic Machinery Co.* 155.

#### *Employer's Liability.*

Federal employers' liability act.

On the evidence at the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, when he was inspecting a dwarf signal by a track near a station and was struck by a freight train which emerged from under a bridge under

*Negligence (continued).*

which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet, it was held that there was no evidence that negligence on the part of the fireman of the freight train caused the death of the plaintiff's intestate, since, if he had been on watch as required by rules of the defendant, he could not have seen the plaintiff's intestate in time to prevent the accident. *Casey v. Boston & Maine Railroad*, 529.

For the same reason it was held that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to." *Ibid.*

It further was held that at the trial of the action above described there was no evidence warranting a finding that negligence of the engineman caused the death of the plaintiff's intestate. *Ibid.*

#### *Street Railway.*

Person on public or private way.

On the evidence at the trial of an action against a street railway corporation for personal injuries caused by a collision between an electric street railway car of the defendant and a motor car driven by the plaintiff, when the plaintiff had backed his car from a garage on a city street across the sidewalk and into the street and was in the act of turning his car to go forward on the street when it was struck by the street railway car of the defendant, it was held that under St. 1914, c. 553, it could not be ruled as matter of law that the defendant had proved that the plaintiff was negligent. *Gagnon v. Worcester Consolidated Street Railway*, 160.

In the same case it was said that, although it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, yet he well might rely to some extent on the expectation that the motorman would act with due regard to the safety of others lawfully using the street. *Ibid.*

Running an electric street railway car after dark upon a track on a country road, "sparsely settled," at the rate of from twenty to twenty-five miles an hour and having a searchlight at the head of the car, not different from nor more powerful than those in common use after dark upon street cars in such places, is not evidence of negligence in the operation of the car. *Anger v. Worcester Consolidated Street Railway*, 163.

In an action by an executor against a street railway corporation for causing the death of the plaintiff's testator by running into him with a car which he knew was approaching, failure to ring a bell or sound a whistle to give notice of the car's approach was held to be immaterial, because the testator knew of the car's approach. *Ibid.*

In the same case it was held that evidence, that, if the bell had been rung or the whistle had been sounded, the testator would have heard it, properly was excluded as immaterial. *Ibid.*

In the same case it was held that the motorman's failure to anticipate that the testator would run so near the track as to be hit by the car or would attempt to cross the track at a place where it would be impossible to avoid an accident was no evidence of negligence. *Ibid.*

In the same case it was said, that, as there was no evidence to warrant a finding that the defendant was negligent, it was not necessary to consider whether under St. 1914, c. 553, it was shown as matter of law that the negligence of the intestate contributed to his injury and death. *Anger v. Worcester Consolidated Street Railway*, 163.

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, running on a track laid over a private way not in a city, passed a white post, which was not a stopping place for that car, at a rate of speed of from twenty to thirty miles an hour. *Daigneau v. Worcester Consolidated Street Railway*, 166.

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, when not being operated in a city, carried a powerful headlight, whose rays had a tendency to dazzle and temporarily blind a person watching its approach, it being a matter of common knowledge that such headlights are in general use under similar circumstances upon electric street railway cars at night. *Ibid.*

A person, watching and waiting for an approaching electric street railway car and signalling for it to stop, in an action against the street railway corporation for injuries caused by its running board striking him, cannot contend that the defendant's motorman was negligent in failing to sound a gong or blow a whistle to give notice of the car's approach. *Ibid.*

A motorman operating a street railway car at night, who sees a man standing in line with a white post, at which that car is not to stop, which is about five feet from the track, reasonably may believe that the man is not in danger of being struck by the running board of the car as it passes him. *Ibid.*

A motorman operating a street railway car in a city street, not going at an excessive rate of speed and sounding the gong, cannot be found to have been negligent in running down a traveller on foot who stepped from a place of safety directly in front of the moving car, if the motorman had no reason to suppose that the foot traveller was unaware of the approaching car and, as soon as it was evident that the traveller was in a place of danger, did all that could be done to check the speed of the car. *Boyle v. Worcester Consolidated Street Railway*, 184.

Instruction to the jury at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate by striking him with the front corner of a street railway car of the defendant, when the intestate on foot had turned to cross the track in front of the moving car, "that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other," was held to be correct and sufficient. *Sawyer v. Worcester Consolidated Street Railway*, 215.

In the case above described there was evidence of the defendant that the intestate walked along in the street by the side of the defendant's track and then turned to the left and stepped on the track in front of the moving car, and it was held that the presiding judge properly refused to give an instruction requested by the plaintiff which was based on the assumption that the intestate was run into from behind by the defendant's car. *Ibid.*

In the above case it was held that the judge clearly and accurately and with apt illustrations pointed out to the jury the duty which the defendant's motorman, in the operation and management of the car, owed to the plaintiff's intestate. *Ibid.*



Negligence (*continued*).

In the same case, where the judge sufficiently and accurately had stated to the jury the relative rights of a pedestrian on a highway and of a street railway company operating a car upon its tracks on the highway, it was held that this subject was covered sufficiently by the judge's charge and that it was the duty of the jury to consider the particular circumstances of the case as shown by the evidence to have existed at the time of the accident, as they correctly were told to do by the judge. *Sawyer v. Worcester Consolidated Street Railway*, 215.

A woman, who, before the enactment of St. 1914, c. 553, walked slowly across a street railway track in front of a moving street railway car that she had seen forty feet away and which she could have seen was very near her before she walked in front of it, and was injured by being knocked down by the car, cannot maintain an action against the corporation operating the car for her injuries. *Bradley v. Bay State Street Railway*, 572.

## Passenger.

It is not reasonably practicable to require the conductor of a street railway car before performing his ordinary duties to look on all sides to ascertain whether some change of position by a passenger, not ordinarily to be expected, may result in the collision of some part of the conductor's body with such passenger. *Nichols v. Boston Elevated Railway*, 299.

Where the conductor of a street railway car with the seats running lengthwise is passing through the car taking fares and, when he is in the act of pulling the overhead strap to ring in a fare or to give the signal to start the car, a passenger who is behind the conductor begins to rise from his seat in order to make ready to get out at the next stopping place, and the conductor's elbow as his arm descends in pulling the strap comes in contact with the rising passenger and knocks off his eyeglasses, which break and injure one of his eyes, this is a pure accident, and these facts are no evidence of negligence toward the passenger on the part of the conductor. *Ibid.*

## Construction operations.

The evidence at the trial of an action by a teamster against a street railway corporation for personal injuries from being thrown from a wagon when the horse he was driving shied at the canvas cover of a rail grinding machine of the defendant that had been left standing on one of its tracks in a public highway, was held to warrant submission to the jury of the question, whether the machine made the street dangerous to travellers, and it was held that, if the jury found that the machine constituted an obstruction in the highway, the defendant's failure to procure a license was evidence of its negligence. *Labuff v. Worcester Consolidated Street Railway*, 170.

## Railroad.

In an action against a surgeon for damages resulting from the defendant's negligence in operating upon the plaintiff on the wrong side for a rupture caused by an accident for which a railroad corporation was liable, it was said that it was unnecessary to consider, whether the railroad corporation would have been liable for the aggravation of the plaintiff's injury caused by the defendant's mistake in operating on the wrong side if there had been no mistake in regard to the identity of the patient. *Purchase v. Seelye*, 434.

An engineman of a freight train has a right, in the operation of his engine, to as-

sume that signal men of his employer who are thoroughly familiar with the location of the tracks and the movements of both freight and passenger trains will take reasonable precautions to ensure their own safety. *Casey v. Boston & Maine Railroad*, 529.

On the evidence at the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, when he was inspecting a dwarf signal by a track near a station and was struck by a freight train which emerged from under a bridge under which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet, it was held that there was no evidence that negligence on the part of the fireman of the freight train caused the death of the plaintiff's intestate, since, if he had been on watch as required by rules of the defendant, he could not have seen the plaintiff's intestate in time to prevent the accident. *Ibid.*

For the same reason it was held that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to." *Ibid.*

At the same trial, a witness testified that when the accident happened the train was late and was running "very much faster" than the witness "ever saw it go before," and it was held that this evidence would not warrant a finding that the train was running at an excessive rate of speed. *Ibid.*

It further was held that at the trial of the action above described there was no evidence warranting a finding that negligence of the engineman caused the death of the plaintiff's intestate. *Ibid.*

#### *Motor Vehicle.*

On the evidence at the trial of an action against a street railway corporation for personal injuries caused by a collision between an electric street railway car of the defendant and a motor car driven by the plaintiff, when the plaintiff had backed his car from a garage on a city street across the sidewalk and into the street and was in the act of turning his car to go forward on the street when it was struck by the street railway car of the defendant, it was held that under St. 1914, c. 553, it could not be ruled as matter of law that the defendant had proved that the plaintiff was negligent. *Gagnon v. Worcester Consolidated Street Railway*, 160.

In the same case it was said that, although it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, yet he well might rely to some extent on the expectation that the motorman would act with due regard to the safety of others lawfully using the street. *Ibid.*

On the evidence at the trial of an action for personal injuries against a person who, when driving a motor car at the rate of from thirty-five to forty miles an hour at night on a State highway, ran into pedestrians, it was held that it could be found that the rate of speed at which the defendant was driving was excessive and dangerous to travellers and that he was violating St. 1909, c. 534, §§ 14, 16, and was negligent. *Emery v. Miller*, 243.

Negligence (*continued*).

On the evidence at the trial above described, it appearing that the accident happened after the enactment of St. 1914, c. 553, it further was held that, even if in view of what happened the pedestrians did not choose the wisest course in the instant permitted them for decision, their conduct was not conclusive against them upon the question of their negligence. *Emery v. Miller*, 243.

In an action for personal injuries sustained by being struck by a motor car of the defendant, proof that the defendant owned the car, without any evidence that he was in control of it or that the person driving it was his servant, does not entitle the plaintiff to go to the jury. *Phillips v. Gookin*, 250.

At the trial of an action for personal injuries sustained from being run into by a motor car owned and driven by the defendant when the plaintiff was riding a motor cycle on a highway, where the plaintiff had testified that at the time of the accident he did not have an operator's license to run a motor cycle, it was proper to exclude a question asked him on his cross-examination by the defendant, "Did you ever have an operator's license to run a motor cycle?" *Polmatier v. Newbury*, 307.

In the same case it was said that in making the decision stated above the court did not mean to intimate that the question was not excluded properly on the ground, that acts of negligence committed on other occasions than the one in question are inadmissible because they lead to collateral inquiries which would distract the jury from the issue on trial and have no logical tendency to determine it. *Ibid.*

In an action against the owner and operator of a motor car for causing the death of a boy sixteen years of age, who was standing in the street with another boy watching a concrete mixing machine which was being operated when he was struck by the defendant's car, it was held that on the facts which could have been found upon the evidence, it could not be ruled as matter of law that the plaintiff's intestate was negligent. *Sarmiento v. Vance*, 310.

In the case above described there was no evidence that the intestate looked behind him before stepping back, and it was said that, if he did not, his failure to do so would not necessarily be negligence. *Ibid.*

In the same case it was said that it was not necessary to consider, whether, if the accident had happened before the enactment of St. 1914, c. 553, there would have been evidence to warrant a finding that the intestate was actively in the exercise of due care. *Ibid.*

On the evidence at the trial of an action by a policeman against the owner and driver of a motor vehicle for personal injuries received when the plaintiff was struck by the vehicle just after he had alighted at night from a street car, it was held that it could not have been ruled as matter of law that the plaintiff was negligent. *Hartnett v. Tripp*, 382.

In the case above referred to it was held that the jury might have found that the defendant violated the part of St. 1909, c. 534, which provides that "In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down and if it be necessary for the safety of the public he shall bring said vehicle to a full stop." *Ibid.*

In an action against a married woman, who carried on a teaming business on her separate account, for the causing of the death of a pedestrian who

was run into by a motor car bought under a contract of conditional sale made in the name of the defendant's husband, it was held that it was error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could have found that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should have been left to the jury. *Goldrick v. Lacombe*, 397.

Where one leading two horses on a much travelled highway at half past six o'clock on a pleasant but dark October evening was walking at the left of the horses and was himself on the right of the middle of the way, carrying no lantern, when he was struck and killed by a motor car approaching from behind and driven at the rate of twenty-five miles an hour, in an action for causing his death it cannot be ruled under St. 1914, c. 553, that he was negligent as matter of law. *Powers v. Loring*, 458.

In the action mentioned above it was treated as beyond question that there was evidence of negligence on the part of the driver of the car, who was the defendant's servant engaged in the defendant's business. *Ibid.*

In an action, brought after the enactment of St. 1914, c. 553, against the owner of a motor truck, whose servant was driving it in the course of the owner's business, for causing the death of a boy, who, after he got off a truck and started to walk in a diagonal direction to his left across the street, was struck by the defendant's motor truck approaching from behind, which turned to the left to go by the one in front of it, it was held that, on the evidence, the questions whether the boy was negligent and whether the defendant's servant was negligent were for the jury. *Buckley v. Sutton*, 504.

At the trial of an action by the administratrix of the estate of a teamster for causing the death of the plaintiff's intestate by running over him with a motor truck after the enactment of St. 1914, c. 553, as he was in front of his team leading them from the yard of a contractor into a public way, it was held that the evidence did not warrant a ruling that the burden of proving contributory negligence, placed on the defendant by St. 1914, c. 553, had been sustained, and that a finding that the plaintiff's intestate was in the exercise of due care was warranted. *Burns v. Oliver Whyte Co. Inc.* 519.

At the trial of the action above described, there was further evidence that the day was clear, that the driver of the defendant's motor truck had a clear view of the plaintiff's intestate for from five hundred to six hundred feet, that the truck was running at a speed of twenty miles an hour and that no warning was given of its approach, and it was held that a finding that the defendant's driver was negligent was warranted. *Ibid.*

On the evidence at the trial of an action by a young girl against the owner of a motor car for personal injuries caused by the negligence of the defendant's chauffeur, where it appeared that the plaintiff was being transported in the car by invitation of the defendant's daughter authorized by the defendant, it was held that the plaintiff had only the right of an invited guest who was travelling gratuitously, and that the defendant was not liable at common law for her injuries unless they were caused by the gross negligence of his servant, the chauffeur. *Flynn v. Lewis*, 550.

In the case above described it also was held that whether the chauffeur was

Negligence (*continued*).

grossly negligent was a question of fact for the jury on the evidence presented and that the presiding judge rightly refused to rule as matter of law that upon all the evidence the plaintiff had established gross negligence on the part of the chauffeur. *Flynn v. Lewis*, 550.

In the case above described the presiding judge excluded evidence offered by the plaintiff to show, that on the morning of the day of the accident, when the defendant's wife was using the motor car, the chauffeur drove fast, the plaintiff contending that this tended to show reckless habits of the chauffeur which were known or ought to have been known to the defendant, and it was held that the evidence was excluded properly. *Ibid*.

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate when she was travelling as an invited guest in the defendant's motor car, which was overturned by reason of the negligent driving of the defendant's chauffeur, it is right for the presiding judge to refuse to rule that the plaintiff cannot recover unless gross negligence of the chauffeur is shown, because the statute by its terms provides for recovery on proof of only ordinary negligence. *Ibid*.

#### *In Use of Highway.*

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, when not being operated in a city, carried a powerful headlight, whose rays had a tendency to dazzle and temporarily blind a person watching its approach, it being a matter of common knowledge that such headlights are in general use under similar circumstances upon electric street railway cars at night. *Daigneau v. Worcester Consolidated Street Railway*, 166.

Running an electric street railway car after dark upon a track on a country road, "sparsely settled," at the rate of from twenty to twenty-five miles an hour and having a searchlight at the head of the car, not different from nor more powerful than those in common use after dark upon street cars in such places, is not evidence of negligence in the operation of the car. *Anger v. Worcester Consolidated Street Railway*, 163.

On the evidence at the trial of an action against a street railway corporation for personal injuries caused by a collision between an electric street railway car of the defendant and a motor car driven by the plaintiff, when the plaintiff had backed his car from a garage on a city street across the sidewalk and into the street and was in the act of turning his car to go forward on the street when it was struck by the street railway car of the defendant, it was held that under St. 1914, c. 553, it could not be ruled as matter of law that the defendant had proved that the plaintiff was negligent. *Gagnon v. Worcester Consolidated Street Railway*, 160.

In the same case it was said that, although it was the plaintiff's duty to exercise reasonable care for his own safety at this dangerous place, yet he well might rely to some extent on the expectation that the motorman would act with due regard to the safety of others lawfully using the street. *Ibid*.

The evidence at the trial of an action by a teamster against a street railway corporation for personal injuries from being thrown from a wagon when the horse he was driving shied at the canvas cover of a rail grinding machine of the defendant that had been left standing on one of its tracks in a public highway, was held to warrant submission to the jury of the question, whether

the machine made the street dangerous to travellers, and it was held that, if the jury found that the machine constituted an obstruction in the highway, the defendant's failure to procure a license was evidence of its negligence. *Labuff v. Worcester Consolidated Street Railway*, 170.

A motorman operating a street railway car in a city street, not going at an excessive rate of speed and sounding the gong, cannot be found to have been negligent in running down a traveller on foot who stepped from a place of safety directly in front of the moving car, if the motorman had no reason to suppose that the foot traveller was unaware of the approaching car and, as soon as it was evident that the traveller was in a place of danger, did all that could be done to check the speed of the car. *Boyle v. Worcester Consolidated Street Railway*, 184.

Instruction to the jury at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate by striking him with the front corner of a street railway car of the defendant, when the intestate on foot had turned to cross the track in front of the moving car, "that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other," was held to be correct and sufficient. *Sawyer v. Worcester Consolidated Street Railway*, 215.

On the evidence at the trial of an action for personal injuries against a person who, when driving a motor car at the rate of from thirty-five to forty miles an hour at night on a State highway, ran into pedestrians, it was held that it could be found that the rate of speed at which the defendant was driving was excessive and dangerous to travellers and that he was violating St. 1909, c. 534, §§ 14, 15. *Emery v. Miller*, 243.

On the evidence at the trial above described, it appearing that the accident happened after the enactment of St. 1914, c. 553, it further was held that, even if in view of what happened the pedestrians did not choose the wisest course in the instant permitted them for decision, their conduct was not conclusive against them upon the question of their negligence. *Ibid.*

Evidence at the trial of an action against the owner of a delivery wagon by a woman, who, when crossing a street slowly in a slightly diagonal course for a distance of about fifteen feet, was struck by the wagon which was being driven very fast, upon which it was held that the plaintiff was entitled to go to the jury on the issues of the negligence of the defendant's servant and of her own negligence. *Seabut v. Ward Baking Co.* 339.

In the case above described it was said that, even if the accident had happened before the enactment of St. 1914, c. 553, there would have been evidence for the jury of the plaintiff's due care. *Ibid.*

It is not negligent as matter of law for a person on foot to cross a city street between cross walks taking a slightly diagonal course. *Ibid.*

On the evidence at the trial of an action by a policeman against the owner and driver of a motor vehicle for personal injuries received when the plaintiff was struck by the vehicle just after he had alighted at night from a street car, it was held that it could not have been ruled as matter of law that the plaintiff was negligent. *Hartnett v. Tripp*, 382.

Where one leading two horses on a much travelled highway at half past six o'clock on a pleasant but dark October evening was walking at the left of the horses and was himself on the right of the middle of the way, carrying no lantern, when he was struck and killed by a motor car approaching from

*Negligence (continued).*

behind and driven at the rate of twenty-five miles an hour, in an action for causing his death it cannot be ruled under St. 1914, c. 553, that he was negligent as matter of law. *Powers v. Loring*, 458.

In the action mentioned above it was treated as beyond question that there was evidence of negligence on the part of the driver of the car, who was the defendant's servant engaged in the defendant's business. *Ibid.*

In an action, brought after the enactment of St. 1914, c. 553, against the owner of a motor truck, whose servant was driving it in the course of the owner's business, for causing the death of a boy, who, after he got off a truck and started to walk in a diagonal direction to his left across the street, was struck by the motor truck of the defendant approaching from behind, which turned to the left to go by the one in front of it, it was held that on the evidence the questions whether the boy was negligent and whether the defendant's servant was negligent were for the jury. *Buckley v. Sutton*, 504.

At the trial of an action by the administratrix of the estate of a teamster for causing the death of the plaintiff's intestate by running over him with a motor truck after the enactment of St. 1914, c. 553, as he was in front of his team leading them from the yard of a contractor into a public way, it was held that the evidence did not warrant a ruling that the burden of proving contributory negligence, placed on the defendant by St. 1914, c. 553, had been sustained, and that a finding that the plaintiff's intestate was in the exercise of due care was warranted. *Burns v. Oliver Whyte Co. Inc.* 519.

At the trial of the action above described, there was further evidence that the day was clear, that the driver of the defendant's motor truck had a clear view of the plaintiff's intestate for from five hundred to six hundred feet, that the truck was running at a speed of twenty miles an hour and that no warning was given of its approach, and it was held that a finding that the defendant's driver was negligent was warranted. *Ibid.*

A woman, who, before the enactment of St. 1914, c. 553, walked slowly across a street railway track in front of a moving street railway car that she had seen forty feet away and which she could have seen was very near her before she walked in front of it, and was injured by being knocked down by the car, cannot maintain an action against the corporation operating the car for her injuries. *Bradley v. Bay State Street Railway*, 572.

*Of Gratuitous Bailees.*

A gratuitous bailee is liable to his bailor only for damages caused by bad faith or gross negligence for which he is responsible. *Altman v. Aronson*, 588.

At the trial of an action by a bailor against a gratuitous bailee for damages resulting from the fact that the defendant in shipping the bailed goods by express to the plaintiff stated to the express company as their value \$50 when the goods were worth over \$280, it was held that a rule laid down by the judge in his charge would impose upon the defendant liability for simple negligence when he was liable only for bad faith or gross negligence, and that the instruction was erroneous. *Ibid.*

It also was said that on the evidence, with the testimony of the defendant's employee disbelieved, a finding was warranted that the defendant was grossly negligent in reshipping the silk to the plaintiff with a valuation of not more than \$50, when its value was more than \$280. *Ibid.*

*Of One controlling Real Estate.*

Action for personal injuries received by one in an office building on business with a tenant and injured when the elevator fell due to a defective safety device. *Draper v. Cotting*, 51.

Executrix of the will of a coal dealer, who went with one of his teams to deliver coal ordered by a machinery company, and, while he was standing on his wagon engaged in shovelling coal into a coal pit, was caught by his clothing and drawn to a rapidly revolving shaft with projecting nuts, which was only four and a half feet above the floor of the wagon where he was standing, receiving injuries which caused his death, was held not to be entitled to maintain an action against the machinery company for causing his death. *Hunt v. Economic Machinery Co.* 155.

In an action for personal injuries sustained on a winter day by reason of a fall caused by slipping on a step, alleged to have been defective and dangerous, leading to a door of the defendant's house which the plaintiff was invited by the defendant to enter, where there is no evidence that the step was defective in any way and the only evidence bearing on the cause of the injury is the testimony of the plaintiff, "I felt this slipperiness of something. My foot slipped sideways on something," there is nothing to warrant an inference that the defendant was negligent. *Sheehan v. Holland*, 246.

In an action by a tenant of the fourth floor of a building against a tenant of the fifth floor for damage resulting from the breaking, alleged to have been caused by negligence of the defendant, of a pipe of a sprinkler system installed by the common landlord, it was held on the evidence that it was a question of fact, whether on all the evidence the damage was due to negligence, and, if so, whether the negligence was that of the defendant, and that a finding of the trial judge in the defendant's favor on that issue would not be disturbed. *Standard Tire & Rubber Co. v. A. L. Richardson & Brothers, Inc.* 374.

Evidence at the trial of an action by an inventor of a pattern for a mechanical device against the proprietor of a foundry, where he was having a casting of it moulded, for personal injuries caused by his falling into a well at the foundry was held to warrant a finding that the plaintiff was on the defendant's premises by invitation, and it was held that it could not be said as matter of law that the invitation was confined to one particular part of the foundry. *Blood v. Ansley*, 438.

It also was held, in the above action, that it was a question of fact for the jury whether the defendant's duty did not require him to guard the well or to see that the plaintiff should be warned of its existence, and accordingly that the question of the defendant's negligence was for the jury. *Ibid.*

In the case above described it appeared that the plaintiff did not look down to see where he was stepping, but it was pointed out that the jury, who viewed the premises, might have found that the well was not so obvious that the plaintiff would have noticed it by looking, and it was held that, with the presumption created by St. 1914, c. 553, it could not be said that it was error for the presiding judge to submit to the jury the question of the plaintiff's contributory negligence. *Ibid.*

In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the



fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, alleged to have been caused by negligence of the defendant causing an overflow of water, it was held that on circumstantial evidence a finding for the plaintiff was warranted. *Goldberg v. Federman*, 443.

Evidence at the trial of the case above described that the faucet and sink were used only once during the day of the accident and then by a man working on the outside of the building, who washed blood from his injured hand, was held not to preclude the trial judge from drawing the inference that the overflowing of the water was caused by negligence of the defendant or of one of his servants. *Ibid.*

In an action by a woman, who occupied with her husband the top floor of a three-story apartment house, against the owner of the house for personal injuries caused by the giving way of a step forming part of a "bulkhead" stairway leading from the yard of the house to the cellar as a common stairway for the use of all the tenants, it was held that there was evidence for the jury of the defendant's negligence. *Oles v. Dubinsky*, 447.

In the action above described it also was held that, upon the evidence, it could be found that the defect which caused the plaintiff's injury was not an obvious one and that under St. 1914, c. 553, the question of the plaintiff's negligence was for the jury. *Ibid.*

Where, at the trial of an action for personal injuries suffered by the plaintiff after the enactment of St. 1914, c. 553, due to a fall in a building under the defendant's control in which the plaintiff was at the defendant's invitation, the only evidence shows that the premises were strange to the plaintiff and were very dark, that he knew and appreciated the degree of darkness, was in no way misled by any act or omission of the defendant and had no false sense of safety, but went ahead nevertheless and fell down steps which he did not see, a verdict must be ordered for the defendant, because the only reasonable inference to be drawn from the evidence is that negligence of the plaintiff contributed to his injury. *Benton v. Watson*, 582.

Actions for personal injuries resulting from negligence as to use or maintenance of an elevator, see appropriate subtitle, *post*.

#### *In Use or Maintenance of Elevator.*

Upon the evidence at the trial of an action against the owner of an office building for personal injuries sustained when in a passenger elevator in the building maintained and controlled by the defendant, which shot downward with "great violence," inclining to one side and stopping at a point near the third floor, where it substantially was wrecked, it was held that the plaintiff was entitled to go to the jury. *Draper v. Cotting*, 51.

In the case above described it also was held that evidence properly was admitted on which it could have been found that the safety device was an obsolete and improper appliance, because an improved safety device had been in common use for a considerable period before the accident, by the adoption of which the accident would have been avoided. *Ibid.*

In the same case it was held that the defendant, while not required to use any particular appliance, was bound to exert every reasonable effort to secure safety. *Ibid.*

In the same case there was evidence warranting a finding that a defect in the

type of safety device attached to the elevator could "only be discovered by a careful inspection of the mechanism at the top of the elevator well and on the bottom of this car made by a person familiar with the construction and operation of elevators," and it was held that, if it were found that the device was defective, it also could be found that the defect was a hidden one as defined in *Andrews v. Williamson*, 193 Mass. 92, for which the defendant would be responsible. *Draper v. Cotting*, 51.

In the same case it was held that an instruction rightly was given to the jury to the effect that the defendant was bound to use ordinary care to ascertain whether the safety device was reasonably safe for the purposes for which it was designed and intended and thereafter to see that it was maintained in a reasonably safe condition. *Ibid.*

In the same case it was held that an instruction rightly was given to the jury to the effect that, if the elevator was apparently safe when the tenant, with whom the plaintiff had been transacting business, began its occupancy, it was the duty of the defendant as landlord to use reasonable care to keep it safe, and, if the elevator was in fact unsafe at the time when it was apparently safe, it was the defendant's duty as landlord during the occupancy of the tenant to put the elevator in a safe condition and to use reasonable care to keep it so. *Ibid.*

In the same case the defendant introduced in evidence a portion of the regulations of the board of elevator regulations relating to the installation of speed governors connected with safety devices of power elevators and showed that the defendant had installed such speed governors, and it was held, that the jury rightly were instructed that the question was not, whether the defendant had complied with these regulations, but, whether the device used, when properly connected with the speed governor, was reasonably safe. *Ibid.*

In the same case it was pointed out that, whether the defendant had used due care in his relation to the plaintiff, was a question of fact on all, and not on a portion, of the evidence. *Ibid.*

Refusal of the presiding judge in the action above described to rule that the doctrine of *res ipsa loquitur* had no application to the case, and his instructions given to the jury on that subject were held to have been right. *Ibid.*

In the same case it was said, "The jury well could find that, while it [the elevator] was being used in the customary manner, its collapse and partial demolition occurred, and this fact of itself until explained was sufficient for the application of the doctrine" of *res ipsa loquitur*. *Ibid.*

In the same case it was held that the jury rightly were instructed as follows: "Merely because the instantaneous device operated and operated in the way in which it was intended to operate and thus prevented more serious injury from happening than did happen, in this particular case, it would not absolve the defendants from blame if they were negligent in causing the safety device to come into operation." *Ibid.*

On the evidence at the trial of an action by an administrator against the proprietor of a hotel for causing the death of the plaintiff's intestate by negligence in the maintenance and operation of an elevator in which a night watchman of the defendant had started to take the intestate to his room as a guest at the hotel, it was held that, due care on the part of the plaintiff's intestate being presumed under St. 1914, c. 553, the case properly was submitted to the jury. *Bechtold v. Rae*, 151.

*Negligence (continued).*

In the case above described it was said that it was not necessary to consider, whether without the presumption created by the statute there would have been evidence of due care of the plaintiff's intestate. *Bechtold v. Rae*, 151.

*In Use of Gas.*

Evidence, at the trial of an action against a town which made and sold illuminating gas to its inhabitants, including the plaintiff, for personal injuries alleged to have been caused by the fumes of illuminating gas escaping upon the plaintiff's premises through alleged negligence of the defendant's employees in permitting two teaspoonfuls of "water drip" to run upon the cellar floor, was held to warrant a finding of negligence of the defendant's employees in permitting the "water drip" to be spilled upon the cellar floor, in not removing it after it was spilled, and in not airing the cellar to rid the premises of the noxious vapors and fumes; and it also was held that a finding was warranted that such negligence caused the plaintiff's injuries. *Powers v. Wakefield*, 565.

*In Use of Electricity.*

Upon circumstantial evidence at the trial of an action against an electric light company for causing the death of a boy about twelve years of age who was found lying on his face on the ground "with his arms all spread out and his legs" close to the gutter of a street near a pole of an electric light company supporting an electric light from which a wire was hanging, it was held that there was evidence for the jury of negligence on the part of the defendant. *Jordan v. Adams Gas Light Co.* 186.

In the case above described the jury found for the defendant on a count for conscious suffering and it was held that an exception by the defendant to the admission of certain alleged declarations of the boy under R. L. c. 175, § 66, must be overruled because these declarations had been made immaterial upon the count for conscious suffering by the verdict on that count; and they could not be considered as evidence in support of the count for causing death, because the boy could not be found to have made intelligent declarations. *Ibid.*

*In Maintenance and Operation of Gate.*

On the evidence at the trial of an action for personal injuries sustained when the plaintiff was eleven years of age by reason of a gate of the defendant falling upon him, where there was evidence that the plaintiff was on a private street after he had come out of the defendant's yard, it was held that it could be found that the plaintiff when injured was not a trespasser nor a mere licensee and that the defendant accordingly was required to take reasonable precautions in the maintenance and management of its gate not to injure the plaintiff when he was in this private street in the exercise of due care. *Barber v. C. W. H. Moulton Ladder Co.* 507.

Upon the evidence as to the conduct of the plaintiff in the case above described, it was held that it could not have been ruled as matter of law that the plaintiff acted carelessly, and that the question, whether he was negligent, was for the jury. *Ibid.*

In the same case it also was held that the jury were warranted in finding that

the defendant was negligent in the construction or maintenance of the gate and that the fall of the gate was caused by the negligence of an employee of the defendant acting within the scope of his duty, and accordingly that a motion to order a verdict for the defendant was denied rightly. *Barber v. C. W. H. Moulton Ladder Co.* 507.

#### *In furnishing Food.*

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened with such tacks. *Ibid.*

#### *Use of Headlight.*

It is not evidence of negligence on the part of a street railway corporation, that one of its cars, when not being operated in a city, carried a powerful headlight, whose rays had a tendency to dazzle and temporarily blind a person watching its approach, it being a matter of common knowledge that such headlights are in general use under similar circumstances upon electric street railway cars at night. *Daigneau v. Worcester Consolidated Street Railway*, 166.

#### *Shafting.*

Executrix of the will of a coal dealer, who went with one of his teams to deliver coal ordered by a machinery company, and, while he was standing on his wagon engaged in shovelling coal into a coal pit, was caught by his clothing and drawn to a rapidly revolving shaft with projecting nuts, which was only four and a half feet above the floor of the wagon where he was standing, receiving injuries which caused his death, was held not to be entitled to maintain an action against the machinery company for causing his death. *Hunt v. Economic Machinery Co.* 155.

#### *Failure to use Proper Safety Device.*

In an action for personal injuries received when an elevator fell because of a defective safety device, it was held that evidence properly was admitted on which it could have been found that the safety device was an obsolete and improper appliance, because an improved safety device had been in common use for a considerable period before the accident, by the adoption of which the accident would have been avoided. *Draper v. Cotting*, 51.

#### *Of Physician.*

Release of a corporation from liability for causing personal injuries was held not to release a surgeon who negligently performed an operation made necessary by the injuries. *Purchase v. Seelye*, 434.

*Sprinkler System.*

In an action by a tenant of the fourth floor of a building against a tenant of the fifth floor for damage resulting from the breaking, alleged to have been caused by negligence of the defendant, of a pipe of a sprinkler system installed by the common landlord, it was held on the evidence that it was a question of fact, whether on all the evidence the damage was due to negligence, and, if so, whether the negligence was that of the defendant, and that a finding of the trial judge in the defendant's favor on that issue would not be disturbed. *Standard Tire & Rubber Co. v. A. L. Richardson & Brothers, Inc.* 374.

*Defective Hoisting Chain.*

It was held that evidence tending to show that employees of a corporation undertaking the repair of a boiler for a city used a defective chain to hoist the boiler from a wagon of the city in which it had been driven to the repair shop, where it was left suspended, would not warrant a finding that the negligent using of the defective chain was the cause of damage caused by the horses, who had been left unattended and with feed bags on, running away when the chain broke and the boiler fell, if there is no evidence that the employees of the corporation knew that the horses of the city had had their bits removed and were left unattended or that they were to remain on the corporation's premises after the boiler had been unloaded. *Sabin v. Cambridge Iron Works*, 511.

*In Installing Oven.*

On the evidence at the trial of an action of tort for negligence brought by a baker against a manufacturer of ovens, for damage resulting from the breaking out of a fire around an oven installed by the defendant under a contract in writing of conditional sale made with the plaintiff, it was held that the plaintiff was entitled to go to the jury. *Barabe v. Duhrkop Oven Co.* 466.

In the action above described it appeared that, when the oven was installed, there was a truss-beam directly over and in contact with the masonry of the arch at the top of the oven, and it was held that, although the defendant was under no obligation to remove the truss-beam, yet, with the truss-beam there, the defendant was bound to use reasonable care to install the oven in such a way that it could be operated safely, and, if the defendant's faulty performance of the work caused the fire, it was liable in damages, even if the exact form in which injury to the plaintiff might result was not foreseen. *Ibid.*

If a manufacturer of ovens installs in the part of a building used by a tenant operating a bakery a baker's oven which the manufacturer annexes to the building, retaining the title to the oven under a contract of conditional sale made with the tenant, and the manufacturer does the work of installation so negligently that when the oven is used the building is set on fire and injured, the owner of the building has a right of action against the manufacturer to recover damages for the natural consequences of the manufacturer's negligence, although there was no contractual relation between the owner and the manufacturer, who when he installed the oven did not know who owned the building. *Ibid.*

*Unguarded Hole near Private Way.*

In an action against an oil company by a housemaid for personal injuries sustained on a foggy evening by falling into an excavation from which a gasoline tank had been removed by the defendant for repairs at the request of the owner of the land, who was the plaintiff's employer, when the plaintiff with two other housemaids was "getting an airing" by walking in the private driveway of their employer, it was held that it was the duty of the defendant, if shown to have made the excavation, to use reasonable care to guard the work and in a proper way to protect the employees of the landowner lawfully using the driveway from the danger of falling into the hole. *O'Neil v. National Oil Co.* 20.

In the same case it was said that, even if the plaintiff at the time of her injury was on the lawn and not on the driveway and was looking for a pear, the jury could find that the plaintiff in passing over the lawn, although not invited, was there lawfully so far as the defendant was concerned and could recover for the consequences of its negligence. *Ibid.*

In the same case it was held that an instruction, requested by the defendant, that there was no evidence that the act of the defendant's driver in digging up the tank was within the scope of his employment, was refused rightly, as there was evidence of the driver's authority to do the work and that, even if he originally had lacked such authority, his acts were ratified by the president's order to go on with the work and by the defendant's acceptance of payment for it from the landowner. *Ibid.*

*In a Mill or Factory.*

Evidence at the trial of an action by an inventor of a pattern for a mechanical device against the proprietor of a foundry where he was having a casting of it moulded for personal injuries caused by his falling into a well at the foundry was held to warrant a finding that the plaintiff was on the defendant's premises by invitation, and it was held that it could not be said as matter of law that the invitation was confined to one particular part of the foundry. *Blood v. Ansley*, 438.

In the case above described it appeared that the plaintiff did not look down to see where he was stepping, but it was pointed out that the jury, who viewed the premises, might have found that the well was not so obvious that the plaintiff would have noticed it by looking, and it was held that, with the presumption created by St. 1914, c. 553, it could not be said that it was error for the presiding judge to submit to the jury the question of the plaintiff's contributory negligence. *Ibid.*

It also was held, in the above action, that it was a question of fact for the jury whether the defendant's duty did not require him to guard the well or to see that the plaintiff should be warned of its existence, and accordingly that the question of the defendant's negligence was for the jury. *Ibid.*

*Unloading Ship.*

A master stevedore, who has been employed by the owner of a vessel to unload her, is bound to exercise reasonable care not to injure one who has been ap-

*Negligence (continued).*

- pointed custodian of the vessel by the United States marshal of the district and is lawfully on board of the vessel in that capacity. *Sughrue v. Booth*, 538.
- In an action by a longshoreman against the proprietor of a schooner engaged in interstate commerce for personal injuries received when the plaintiff, in the employ of an independent contractor, was unloading a cargo of coal from the hold of the schooner when lying in navigable waters, where such proprietor of the schooner was a subscriber under the workmen's compensation act, the defendant cannot set up in defence, that the plaintiff has waived his right of action at common law by having failed to give notice under St. 1911, c. 751, Part I, § 5, that he claimed his right of action at common law. *Duart v. Simmons*, 313.
- In such an action at common law brought by a longshoreman injured in the manner above described there was evidence of his due care in addition to the presumption created by St. 1914, c. 553, and it was held that the question, whether the defendant had shown that negligence of the plaintiff contributed to his injury, was for the jury. *Ibid.*
- In such an action the defendant is responsible for the negligence of his own servants, who were not the fellow servants of the plaintiff because the plaintiff was in the employ of the independent contractor and not of the defendant. *Ibid.*
- In the same action it was said that the defendant would not have been liable for the negligence of the fellow servants of the plaintiff who were employed by the independent contractor, but there was no evidence of any negligence of such servants contributing to the plaintiff's injury. *Ibid.*
- In the same action it was held that there was no error in refusing to make rulings to the effect that the defendant was not responsible, if the rope whose parting caused a tub of coal to fall on the plaintiff was purchased from a reputable dealer and gave way because of a hidden flaw after being used a few times, because it appeared by the defendant's own testimony that he had owned the rope for about six months and had used it for unloading a cargo of coal before the cargo for which it was being used at the time of the accident, and the instructions given by the judge upon this point could not be said to have been insufficient under all the circumstances. *Ibid.*

#### *Overflowing Water.*

- Action of tort for damages alleged to have been caused by negligence of the defendant, who occupied the floor above the plaintiff in a building equipped with a sprinkler system, which negligence caused a leak in the system. *Standard Tire & Rubber Co. v. A. L. Richardson & Brothers, Inc.* 374.
- In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, alleged to have been caused by negligence of the defendant causing an overflow of water, it was held that on circumstantial evidence a finding for the plaintiff was warranted. *Goldberg v. Federman*, 443.
- Evidence at the trial of the case above described that the faucet and sink were used only once during the day of the accident and then by a man working on the outside of the building, who washed blood from his injured hand, was

held not to preclude the trial judge from drawing the inference that the overflowing of the water was caused by negligence of the defendant or of one of his servants. *Goldberg v. Federman*, 443.

*Toward One acting as Custodian of Vessel.*

A master stevedore, who has been employed by the owner of a vessel to unload her, is bound to exercise reasonable care not to injure one who has been appointed custodian of the vessel by the United States marshal of the district and is lawfully on board of the vessel in that capacity. *Sughrus v. Booth*, 538.

*Of Tenant of Upper Floor of Building.*

In an action by a tenant of the fourth floor of a building against a tenant of the fifth floor for damage resulting from the breaking, alleged to have been caused by negligence of the defendant, of a pipe of a sprinkler system installed by the common landlord, it was held on the evidence that it was a question of fact, whether on all the evidence the damage was due to negligence, and, if so, whether the negligence was that of the defendant, and that a finding of the trial judge in the defendant's favor on that issue would not be disturbed. *Standard Tire & Rubber Co. v. A. L. Richardson & Brothers, Inc.* 374.

In an action, by a wall-paper dealer occupying for storage the third floor of a building against another wall-paper dealer occupying also for storage the fourth floor or loft of the same building, for damage by water to the plaintiff's wall-paper stock, alleged to have been caused by negligence of the defendant causing an overflow of water, it was held that on circumstantial evidence a finding for the plaintiff was warranted. *Goldberg v. Federman*, 443.

Evidence at the trial of the case above described that the faucet and sink were used only once during the day of the accident and then by a man working on the outside of the building, who washed blood from his injured hand, was held not to preclude the trial judge from drawing the inference that the overflowing of the water was caused by negligence of the defendant or of one of his servants. *Ibid.*

*General, Independent Contractor.*

Proprietor of a ship, for whom an independent contractor and his employees are unloading the ship, is responsible for the negligence of his own servants, who were not the fellow servants of an employee of the independent contractor because such employee was in the employ of the independent contractor and not of the defendant. *Duart v. Simmons*, 313.

In the same action it was said that the defendant would not have been liable for the negligence of the fellow servants of the plaintiff who were employed by the independent contractor, but there was no evidence of any negligence of such servants contributing to the plaintiff's injury. *Ibid.*

*Causing Death.*

In an action against the owner and operator of a motor car for causing the death of a boy sixteen years of age, who was standing in the street with another boy watching a concrete mixing machine which was being operated



Negligence (*continued*).

when he was struck by the defendant's car, it was held that on the facts which could have been found upon the evidence, it could not be ruled as matter of law that the plaintiff's intestate was negligent. *Sarmento v. Vance*, 310.

In the same case it was said that it was not necessary to consider, whether, if the accident had happened before the enactment of St. 1914, c. 553, there would have been evidence to warrant a finding that the intestate was actively in the exercise of due care. *Ibid.*

In an action against a married woman, who carried on a teaming business on her separate account, for the causing of the death of a pedestrian who was run into by a motor car bought under a contract of conditional sale made in the name of the defendant's husband, it was held that it was error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could have found that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should have been left to the jury. *Goldrick v. Lacombe*, 397.

In the action above described the judge also ruled that there was not sufficient evidence that the defendant controlled the operation of the car immediately before and at the time of the accident, and, in sustaining the plaintiff's exceptions on the ground stated above, it was said that, if at a new trial the jury should find that the defendant was not the owner of the car, there was not sufficient evidence of control or of a joint enterprise to require a submission of these issues to the jury. *Ibid.*

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate while in the exercise of due care by the negligence of the defendant's servant, the presumption created by St. 1914, c. 553, is commensurate with the degree of care required by law of the intestate in order that the plaintiff may recover damages. *Powers v. Loring*, 458.

Where one leading two horses on a much travelled highway at half past six o'clock on a pleasant but dark October evening was walking at the left of the horses and was himself on the right of the middle of the way, carrying no lantern, when he was struck and killed by a motor car approaching from behind and driven at the rate of twenty-five miles an hour, in an action for causing his death it cannot be ruled under St. 1914, c. 553, that he was negligent as matter of law. *Ibid.*

In the action mentioned above it was treated as beyond question that there was evidence of negligence on the part of the driver of the car, who was the defendant's servant engaged in the defendant's business. *Ibid.*

In an action, brought after the enactment of St. 1914, c. 553, against the owner of a motor truck, whose servant was driving it in the course of the owner's business, for causing the death of a boy, who, after he got off a truck and started to walk in a diagonal direction to his left across the street, was struck by the motor truck of the defendant approaching from behind, which turned to the left to go by the one in front of it, it was held that on the evidence the questions whether the boy was negligent and whether the defendant's servant was negligent were for the jury. *Buckley v. Sutton*, 504.

At the trial of an action by the administratrix of the estate of a teamster for causing the death of the plaintiff's intestate by running over him with a motor truck after the enactment of St. 1914, c. 553, as he was in front of his team leading them from the yard of a contractor into a public way, it was held that the evidence did not warrant a ruling that the burden of proving contributory negligence, placed on the defendant by St. 1914, c. 553, had been sustained, and that a finding that the plaintiff's intestate was in the exercise of due care was warranted. *Burns v. Oliver Whyte Co. Inc.* 519.

At the trial of the action above described, there was further evidence that the day was clear, that the driver of the defendant's motor truck had a clear view of the plaintiff's intestate for from five hundred to six hundred feet, that the truck was running at a speed of twenty miles an hour and that no warning was given of its approach, and it was held that a finding that the defendant's driver was negligent was warranted. *Ibid.*

On the evidence at the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, when he was inspecting a dwarf signal by a track near a station and was struck by a freight train which emerged from under a bridge under which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet, it was held that there was no evidence that negligence on the part of the fireman of the freight train caused the death of the plaintiff's intestate, since, if he had been on watch as required by rules of the defendant, he could not have seen the plaintiff's intestate in time to prevent the accident. *Casey v. Boston & Maine Railroad*, 529.

For the same reason it was held that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to." *Ibid.*

It further was held that at the trial of the action above described there was no evidence warranting a finding that negligence of the engineman caused the death of the plaintiff's intestate. *Ibid.*

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate when she was travelling as an invited guest in the defendant's motor car, which was overturned by reason of the negligent driving of the defendant's chauffeur, it is right for the presiding judge to refuse to rule that the plaintiff cannot recover unless gross negligence of the chauffeur is shown, because the statute by its terms provides for recovery on proof of only ordinary negligence. *Flynn v. Lewis*, 550.

#### Gross.

Statement by RUGG, C. J., of the rules in regard to negligence, gross negligence and wilful, wanton and reckless conduct. *Altman v. Aronson*, 588.

Where the evidence at the trial of an action makes the rules distinguishing negligence from gross negligence applicable, a party requesting rulings as to such distinction has a right to have adequate instructions given to the jury on that subject. *Ibid.*

*Negligence (continued).*

A gratuitous bailee is liable to his bailor only for damages caused by bad faith or gross negligence for which he is responsible. *Altman v. Aronson*, 588.

At the trial of an action by a bailor against a gratuitous bailee for damages resulting from the fact that the defendant in shipping the bailed goods by express to the plaintiff stated to the express company as their value \$50 when the goods were worth over \$280, it was held that a rule laid down by the judge in his charge would impose upon the defendant liability for simple negligence when he was liable only for bad faith or gross negligence, and that the instruction was erroneous. *Ibid.*

It also was said that on the evidence, with the testimony of the defendant's employee disbelieved, a finding was warranted that the defendant was grossly negligent in reshipping the silk to the plaintiff with a valuation of not more than \$50, when its value was more than \$280. *Ibid.*

On the evidence at the trial of an action by a young girl against the owner of a motor car for personal injuries caused by the negligence of the defendant's chauffeur, where it appeared that the plaintiff was being transported in the car by invitation of the defendant's daughter authorized by the defendant, it was held that the plaintiff had only the right of an invited guest who was travelling gratuitously, and that the defendant was not liable at common law for her injuries unless they were caused by the gross negligence of his servant, the chauffeur. *Flynn v. Lewis*, 550.

In the case above described it also was held that whether the chauffeur was grossly negligent was a question of fact for the jury on the evidence presented and that the presiding judge rightly refused to rule as matter of law that upon all the evidence the plaintiff had established gross negligence on the part of the chauffeur. *Ibid.*

In an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate when she was travelling as an invited guest in the defendant's motor car, which was overturned by reason of the negligent driving of the defendant's chauffeur, it is right for the presiding judge to refuse to rule that the plaintiff cannot recover unless gross negligence of the chauffeur is shown, because the statute by its terms provides for recovery on proof of only ordinary negligence. *Ibid.*

• *Slippery Object whose Presence is Unexplained.*

In an action for personal injuries sustained on a winter day by reason of a fall caused by slipping on a step, alleged to have been defective and dangerous, leading to a door of the defendant's house which the plaintiff was invited by the defendant to enter, where there is no evidence that the step was defective in any way and the only evidence bearing on the cause of the injury is the testimony of the plaintiff, "I felt this slipperiness of something. My foot slipped sideways on something," there is nothing to warrant an inference that the defendant was negligent. *Sheehan v. Holland*, 246.

*Pure Accident.*

Where the conductor of a street railway car with the seats running lengthwise is passing through the car taking fares and, when he is in the act of pulling the overhead strap to ring in a fare or to give the signal to start the car, a passenger who is behind the conductor begins to rise from his seat in order to make ready to get out at the next stopping place, and the conductor's

elbow as his arm descends in pulling the strap comes in contact with the rising passenger and knocks off his eyeglasses, which break and injure one of his eyes, this is a pure accident, and these facts are no evidence of negligence toward the passenger on the part of the conductor. *Nichols v. Boston Elevated Railway*, 299.

*Proximate Cause.*

A person, watching and waiting for an approaching electric street railway car and signalling for it to stop, in an action against the street railway corporation for injuries caused by its running board striking him, cannot contend that the defendant's motorman was negligent in failing to sound a gong or blow a whistle to give notice of the car's approach. *Daigneau v. Worcester Consolidated Street Railway*, 166.

In an action by an executor against a street railway corporation for causing the death of the plaintiff's testator by running into him with a car which he knew was approaching, failure to ring a bell or sound a whistle to give notice of the car's approach was held to be immaterial, because the testator knew of the car's approach. *Anger v. Worcester Consolidated Street Railway*, 163.

In an action for personal injuries caused by the negligence of the defendant in knocking down the plaintiff with a motor car and breaking his leg, evidence that when the plaintiff at a hospital was attempting to get out of a wheel chair one of his crutches slipped and he fell back into the chair, breaking the same bone at the place of the original fracture, was admitted properly, as the jury could find that the second fracture was a natural and approximate result of the first injury. *Hartnett v. Tripp*, 382.

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury, but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release. *Purchase v. Seelye*, 434.

It was held that evidence tending to show that employees of a corporation undertaking the repair of a boiler for a city used a defective chain to hoist the boiler from a wagon of the city in which it had been driven to the repair shop, where it was left suspended, would not warrant a finding that the negligent using of the defective chain was the cause of damage caused by the horses, who had been left unattended and with feed bags on, running away when the chain broke and the boiler fell, if there is no evidence that the employees of the corporation knew that the horses of the city had had their bits removed and were unattended or that they were to remain on the corporation's premises after the boiler had been unloaded. *Sabin v. Cambridge Iron Works*, 511.

On the evidence at the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, when he was inspecting a dwarf signal by a track near a station and

Negligence (*continued*).

was struck by a freight train which emerged from under a bridge under which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet, it was held that there was no evidence that negligence on the part of the fireman of the freight train caused the death of the plaintiff's intestate, since, if he had been on watch as required by rules of the defendant, he could not have seen the plaintiff's intestate in time to prevent the accident. *Casey v. Boston & Maine Railroad*, 529.

For the same reason it was held that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to." *Ibid*.

#### *Violation of Statute.*

Violation of St. 1909, c. 534, by the driver of a motor vehicle which was held to be evidence of negligence. *Hartnett v. Tripp*, 382.

#### *Violation of Rule.*

Where, at the trial of an action against a street railway corporation for personal injuries, the plaintiff was allowed to introduce in evidence certain rules of the defendant, but there was no evidence of any violation of any of these rules, certain instructions of the judge allowing the jury to consider the rules under certain conditions were held to have been error. *London v. Bay State Street Railway*, 480.

#### *Res ipsa loquitur.*

Circumstances were held to warrant the application of the doctrine, *res ipsa loquitur*, in an action for personal injuries caused by the fall of an elevator in an office building when the plaintiff was a passenger thereon. *Draper v. Cotting*, 51.

Proper instructions to the jury on that subject. *Ibid*.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened with such tacks. *Ash v. Childs Dining Hall Co.* 86.

#### *Wilful or Wanton Misconduct.*

Statement by RUGG, C. J., of the rules in regard to negligence, gross negligence and wilful, wanton and reckless conduct. *Altman v. Aronson*, 588.

#### *Of Plaintiff in Action of Contract.*

See appropriate subtitle under CONTRACT.

#### NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

## NOTICE.

Invalid notice of sale of two lots, one mile apart, for collection of taxes. *Phelps v. Creed*, 228.

Certain notice of a foreclosure sale of mortgaged personal property was held to satisfy the requirements of R. L. c. 198, § 5, and of the mortgage. *Freed v. Rosenthal*, 357.

Under WORKMEN'S COMPENSATION ACT, see appropriate subtitle thereunder.

## NOVATION.

In this Commonwealth where the grantee in a deed assumes and agrees to pay a mortgage on the property conveyed, he becomes as between himself and his grantor the principal debtor for the payment of the mortgage debt assumed by him, and the mortgagor as to the grantee becomes a surety, although this does not bind the mortgagee unless he assents to it. *Codman v. Deland*, 344.

But, if thereafter the mortgagee, without the assent or knowledge of the mortgagor, makes an agreement in writing under seal with the grantee extending the time of payment of the mortgage note at an increased rate of interest, the mortgagee by such agreement accepts the grantee as the principal debtor and the mortgagor as a surety and, by the agreement to extend the time of payment contained in the same instrument, made without the knowledge of the mortgagor, discharges the mortgagor from his liability as surety. *Ibid*.

## NUISANCE.

Action of tort against a railroad corporation for damages caused to property of the plaintiffs, trustees, adjacent to a railroad by unnecessary and unreasonable excess of smoke, soot and cinders from the defendant's locomotives. *Matthews v. New York Central & Hudson River Railroad*, 10.

In an action against an oil company by a housemaid for personal injuries sustained on a foggy evening by falling into an excavation from which a gasoline tank had been removed by the defendant for repairs at the request of the owner of the land, who was the plaintiff's employer, when the plaintiff with two other housemaids was "getting an airing" by walking in the private driveway of their employer, it was held that it was the duty of the defendant, if shown to have made the excavation, to use reasonable care to guard the work and in a proper way to protect the employees of the landowner lawfully using the driveway from the danger of falling into the hole. *O'Neil v. National Oil Co.* 20.

## PARKS AND PARK COMMISSION.

A taking of land by a park commission of a city before an appropriation sufficient for the estimated expense thereof shall have been made in the manner provided in R. L. c. 28, followed by an appropriation made by the city council in the manner described by statute, is void and is not made valid by the subsequent action of the city council. *Spare v. Springfield*, 267.

## PARTNERSHIP.

St. 1853, c. 156, now in substance R. L. c. 72, § 5, gives a right to the executor or administrator of the estate of a deceased partner which before the passage of the statute was unknown to the common law or in equity, and under the next section the executor or administrator of the estate of a deceased partner can maintain a suit in equity to enjoin a surviving partner from continuing to use the name of the testator or intestate in his business. *Kelly v. Morrison*, 574.

Such a suit in equity may be brought at any time while such use of the testator's or intestate's name continues, and while such use continues neither the statute of limitations nor laches is applicable as a defence to such a suit. *Ibid.*

By the statute named above the right to maintain a suit in equity to enjoin the continuance of the use of the name of a deceased partner is given only to "his legal representatives," and former partners of a firm that used the name of the deceased after his death cannot maintain such a suit. *Ibid.*

## PASSENGER.

Actions for personal injuries suffered by passengers, see appropriate subtitles under NEGLIGENCE.

## PAYMENT.

Acceptance by the holder of an overdue promissory note, which contains no express provision for the payment of interest, from indorsers of the face of the note, with an agreement that it has accepted in full satisfaction of all demands and that an entry should be made in an action against the indorsers of judgment satisfied, was held to entitle the maker of the note to an entry of judgment in his favor in an action against him, no claim of the plaintiff to recover interest from the maker being open. *Paul Revere Trust Co. v. Castle*, 129.

A suit in equity by a married woman, seeking to set aside a discharge of a mortgage signed in her name by means of a rubber stamp by her husband on the ground that the execution of the instrument was unauthorized, was dismissed because the debt secured by the mortgage was paid in full by the mortgagor to the plaintiff's husband who applied the money in paying an obligation of the plaintiff to a trust company, as security for which the plaintiff had pledged the mortgage in question. *Clark v. Young*, 156.

## PHYSICIANS AND SURGEONS.

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release. *Pur Chase v. Seelye*, 434.

## PLEADING, CIVIL.

*Declaration.*

In an action of contract with a declaration containing four counts, purporting to set forth three causes of action, a fifth count, to recover the interest due for the failure of the defendant to meet upon demand its several obligations alleged in the other counts, sets forth no independent cause of action and a demurrer to it on this ground will be sustained. *Northampton v. Northampton Street Railway*, 540.

## PLEADING, CRIMINAL.

*Complaint or Indictment.*

Where a complaint under R. L. c. 76, § 8, charges the defendant with unlawfully holding himself out as a practitioner of medicine between two dates named, the complaint is for a continuing offence and the time during which the defendant is charged with having committed a series of acts is a material part of the offence described, and accordingly evidence of acts committed by the defendant before the time specified must be excluded. *Commonwealth v. Runge*, 598.

The provisions of R. L. c. 218, § 20, in regard to allegations of the time of the commission of a crime are not made applicable to continuing offences where time "is an essential element of the crime." *Ibid.*

## PLEDGE.

*Equitable.*

Where a policy of life insurance names no beneficiary and contains a provision that it shall be void "if the policy be assigned or otherwise parted with," and the insured delivers this policy to a creditor, telling her it is to secure her in case he shall not live to pay what he owes her for board, and such creditor thereafter pays the premiums on the policy until the death of the insured, this gives the creditor no right to maintain an action on the policy. *Pettit v. Prudential Ins. Co. of America*, 394.

Provision in such a policy which was said to make a payment by the insurer of the amount due under the policy to the administrator of the estate of the insured a defence to a suit in equity by a creditor of the insured having an interest as an equitable pledgee of the policy. *Ibid.*

It also was said that, the promise in the policy above described being made to the insured, with no beneficiary named, the insurer was justified in making the payment to the administrator of his estate. *Ibid.*

It also was said that, whether the creditor described above had any equitable priority of claim to the insurance money in the hands of the administrator, could not be considered in a proceeding to which the administrator was not a party. *Ibid.*

## POOR DEBTOR.

An assignment by a debtor, by order of a municipal court in poor debtor session of all his right, title and interest in land previously conveyed by him with



Poor Debtor (*continued*).

intent to defeat, delay or defraud his creditors conveys no legal or equitable title as against his grantee. *Bress v. Gersinovitch*, 563.

### POWER.

A widow, whose husband had devised and bequeathed to her all his property "for her natural life, with power to sell or mortgage said property if she considers it necessary," leaving the remainder to his children upon her death, was held thereby to have power to make a lease of certain real estate that had belonged to her husband, so that the tenant might maintain a suit in equity against the children of the testator to enjoin them from interfering with his quiet enjoyment of the property. *Wolff v. O'Brien*, 487.

Provisions of a will giving the residue to the testator's wife and others as trustees with power to supply needs of the wife and of others (who died leaving the wife surviving), the remaining property to "be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose," where the widow waived the provisions for her benefit in the will and continued to live, were held to create a valid trust for charitable purposes in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries. *Coffin v. Attorney General*, 579.

It also was held that the power of appointment to designate the charities vested in the testator's widow and his daughter and could be exercised by the widow as the survivor of them and that the trustees should be ordered to distribute and pay over the residue to such charitable organizations as the widow as such survivor of the donees of the power should appoint. *Ibid.*

In the suit described above it also was held that an attempted execution by the widow of the power by deed for the benefit of a private trust was void, but that such instrument did not prevent a new appointment by the widow in conformity with the terms of the power. *Ibid.*

### POWER OF ATTORNEY.

See ATTORNEY, POWER OF.

### PRACTICE, CIVIL.

#### *Law of the Case.*

Where a case comes before this court for a second time, the decision of this court at the previous stage of the case is the law of the case and is not open to question upon any of the points of law then passed upon. *Clark v. New England Telephone & Telegraph Co.* 546.

#### *Abatement.*

A plea in abatement to a petition for an assessment of damages caused by the repair of a public way based on the pendency of an earlier petition for the same damages must be overruled, where it appears that in the previous proceedings a verdict was returned for the respondent with leave to the

petitioner to present exceptions to this court, that no exceptions ever were filed and that judgment was entered for the respondent so that the earlier petition was not pending when the second one was brought. *Warner v. Pittsfield*, 138.

#### *Parties.*

In an action against individuals for a broker's commission, it was held that the fact, that the property for which the plaintiff procured a purchaser belonged to a corporation, of which all the stock was owned by the principal defendant, his sister and his father, did not necessarily make the employment of the plaintiff to procure a sale of the property an employment by the corporation, there being evidence that the principal defendant personally employed the plaintiff to find a purchaser for the property. *Johnstone v. Cochrane*, 472.

The action above described, after the death of a third defendant, was prosecuted against the principal defendant and his sister jointly, and the evidence showed a right of action against the principal defendant alone. The principal defendant contended that no recovery could be had against him severally; but it was held that by R. L. c. 177, § 6, such recovery against one of two or more defendants in an action of contract is authorized "although it is found that all the defendants are not jointly liable." *Ibid.*

#### *Amendment.*

A judge of the Superior Court has power to make an order *nunc pro tunc* to amend past docket entries to accord with the facts. *Warner v. Pittsfield*, 138.

#### *Docket Entries.*

Docket entries of a court from which a writ of supersedeas purports to have issued and an indorsement upon the bond signed by the clerk of the court, from which, it was held, it sufficiently appeared that all proper things were done by or by direction of the court and that it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue. *Keith v. Rosnosky*, 409.

A judge of the Superior Court has power to make an order *nunc pro tunc* to amend past docket entries to accord with the facts. *Warner v. Pittsfield*, 138.

#### *Agreed Statement of Facts.*

A statement in an agreed statement of facts presented to this court in a report of a petition for the assessment of damages caused by the repair of a public way by a city, that in a previous proceeding for the assessment of the same damages "a certain notice" which it was necessary that the petitioner should give to the mayor and aldermen "was insufficient," was construed to refer to the omission to file with the mayor and aldermen a "petition for compensation," which by R. L. c. 51, §§ 15, 16, is a necessary preliminary to a petition for the assessment of the damages by a jury. *Warner v. Pittsfield*, 138.

*Auditor's Report.*

Action of a judge as to portions of an auditor's report withdrawn from consideration of the jury because the plaintiff elected to go to the jury upon one count only of three in the declaration, and his charge as to the jury's duty to disregard the auditor's rulings of law and those of his findings of fact which were not pertinent to the counts submitted to the jury were held to show no error. *Matthews v. New York Central & Hudson River Railroad*, 10.

*Memorandum.*

On an appeal from a decree made by a judge of the Superior Court establishing a lien under St. 1909, c. 490, Part II, §§ 74, 75, for the amount of the respondent's proportion of taxes on certain real estate which had been paid by the petitioner as cotenant and ordering a sale of the respondent's interest in the real estate, a memorandum of decision made by the judge is not a part of the record, and, if printed with the record of the appeal, it must be disregarded by this court. *Naylor v. Nourse*, 341.

*Conduct of Trial.*

Discretionary excusing of juror.

Informal exercise by a judge of his discretion in excusing a juror, whose conduct seemed to him to show that the plaintiffs would not have a fair trial if he remained a member of the panel, was held not to be prejudicial to the defendant. *Matthews v. New York Central & Hudson River Railroad*, 10.

Withdrawal of evidence on issues not submitted to jury.

Action of a judge as to portions of an auditor's report withdrawn from consideration of the jury because the plaintiff elected to go to the jury upon one count only of three in the declaration, and his charge as to the jury's duty to disregard the auditor's rulings of law and those of his findings of fact which were not pertinent to the counts submitted to the jury were held to show no error. *Matthews v. New York Central & Hudson River Railroad*, 10.

Evidence admitted without objection.

Evidence, even if inadmissible, if material and admitted without objection, properly may be considered by the jury. *Matthews v. New York Central & Hudson River Railroad*, 10.

Opening statement and argument of counsel.

In an action against a street railway corporation for personal injuries sustained by a collision, with a motor truck, of an open electric car of the defendant, on the running board of which the plaintiff was being transported as a passenger, it is improper for the plaintiff's counsel in his closing argument to the jury to ask the jury whether they expect to be treated, when they go on cars of the defendant's line, the way that the plaintiff was treated by the defendant, to tell them that they are making the law for the county in which the case is being tried, that the defendant is a corporation having the power to

take their land by right of eminent domain on which to lay its tracks and that in consideration of those privileges it is charged with certain duties toward its passengers. *London v. Bay State Street-Railway*, 480.

In the same case it was held that the defendant counsel, by taking an exception to the improper portion of the argument and asking the judge to instruct the jury to disregard it, had saved the defendant's right to have its exceptions sustained unless the judge cured the error that had been committed, which he did not do. *Ibid.*

Statements in the judge's charge were held to have been insufficient to cure the error committed in the argument above described, so that exceptions of the defendant were sustained. *Ibid.*

#### Requests, rulings and instructions.

In an action against an oil company for personal injuries resulting from negligence of an employee of the defendant in leaving unguarded an excavation for a tank on premises of the plaintiff's employer, it was held that an instruction requested by the defendant, that there was no evidence that the act of the defendant's driver in digging up the tank was within the scope of his employment, was refused rightly, as there was evidence of the driver's authority to do the work and that, even if he originally had lacked such authority, his acts were ratified by the president's order to go on with the work, and by the defendant's acceptance of payment for it from the landowner. *O'Neil v. National Oil Co.* 20.

Instructions to the jury before whom was being tried an action for personal injuries caused by the fall of a passenger elevator due to a defective safety device, which were held not to be objectionable. *Draper v. Cotting*, 51.

Instruction to the jury at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate by striking him with the front corner of a street railway car of the defendant, when the intestate on foot had turned to cross the track in front of the moving car, "that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other," was held to be correct and sufficient. *Sawyer v. Worcester Consolidated Street Railway*, 215.

In the case above described there was evidence of the defendant that the intestate walked along in the street by the side of the defendant's track, and then turned to the left and stepped on the track in front of the moving car, and it was held that the presiding judge properly refused to give an instruction requested by the plaintiff which was based on the assumption that the intestate was run into from behind by the defendant's car. *Ibid.*

Upon an exception to an order of a judge denying a motion for a new trial, the excepting party cannot raise for the first time an objection to the sufficiency of an instruction of the judge to the jury on a certain point in regard to which he had raised no question at the trial. *Ibid.*

On the evidence at the trial of an action for the price of five tons of coal, where the defendant testified that he bought the coal from a person other than the plaintiff and paid for it by crediting the price as part of the purchase money for a motor cycle which he delivered to such person under a contract of conditional sale, it was held that the judge properly refused to rule that, "There is no evidence on which the jury can find that [the third person] was authorized as the plaintiff's agent to purchase any motor cycle with

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title to be conferred upon said [third person] at the time of the purchase." *Farnum v. Ramsey*, 286.

A request for an instruction to the jury stating a sound principle of law which is not applicable to the evidence is refused properly. *Duart v. Simmons*, 313.

Where a judge hearing a case without a jury refuses to pass on certain requests for rulings, this is equivalent to a refusal to make the rulings requested.

*Joseph S. Waterman & Sons, Inc. v. Soliday*, 422.

Presumption that instructions by the trial judge were followed by the jury.

*Dempsey v. Goldstein Brothers Amusement Co.* 461.

In an action against a street railway company for personal injuries, where, at the trial, the defendant's conductor was in court but neither the plaintiff nor the defendant called him as a witness, it was held that a request by the defendant for an instruction that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident," should have been given.

*London v. Bay State Street Railway*, 480.

Where the evidence at the trial of an action makes the rules distinguishing negligence from gross negligence applicable, a party requesting rulings as to such distinction has a right to have adequate instructions given to the jury on that subject. *Altman v. Aronson*, 588.

#### Judge's charge.

Exceptions to certain remarks made by a judge in his charge, at the trial of an action of tort for personal injuries, after proper instructions to the jury as to the plaintiff's right of recovery for loss of earning capacity, were overruled because it was plain that the jury could not have misunderstood the judge's meaning and because his statement of the law was correct. *Murray v. Liebmann*, 7.

Action of a judge as to portions of an auditor's report withdrawn from consideration of the jury because the plaintiff elected to go to the jury upon one count only of three in the declaration, and his charge as to the jury's duty to disregard the auditor's rulings of law and those of his findings of fact which were not pertinent to the counts submitted to the jury were held to show no error. *Matthews v. New York Central & Hudson River Railroad*, 10.

A contention that, at a trial, the judge had given an instruction prejudicial to the defendant, where it appeared that the defendant did not call the attention of the judge to this objection to the instruction and took no specific exception to any part of the charge, was held, whether warranted by anything in the charge or not, not to be open to the defendant. *O'Neil v. National Oil Co.* 20.

In an action for personal injuries it was said, "The accuracy of the charge as an exposition of the law applicable to the essential issues of fact is to be determined from all the judge said, and not from detached portions of the charge." *Draper v. Cotting*, 51.

A presiding judge may use illustrations for the purpose of more pointedly directing the attention of the jury to the questions they are to decide. This is a matter of discretion, not to be reviewed unless prejudicial error positively is shown, and none was held to have been shown in the present case. *Ibid.*

In an action where there was no exception to the charge of the judge, but there was an exception to the admission of certain alleged declarations of a deceased person after suffering an injury, it was assumed, in the absence of any exception to any part of the judge's charge, that the judge properly had instructed the jury to disregard the alleged declarations if the declarant after being injured died without conscious suffering. *Jordan v. Adams Gas Light Co.* 186.

It is the duty of a presiding judge to state in his charge to the jury the principles of law applicable to the issues on trial, and it is within his province under R. L. c. 173, § 80, to state the testimony in his instructions fairly and impartially and to submit to the jury all questions of fact material to the issues in dispute without prejudice and without any attempt to influence their verdict. *Sawyer v. Worcester Consolidated Street Railway*, 215.

In the above case it was held that the judge clearly and accurately and with apt illustrations pointed out to the jury the duty which the defendant's motorman, in the operation and management of the car, owed to the plaintiff's intestate. *Ibid.*

Upon exceptions to certain portions of the charge of a presiding judge, where the counsel for the excepting party did not call the judge's attention at the trial to any particular insufficiency or inaccuracy in his instructions to the jury and no complaint was made that further or different instructions were not given, in order that the exceptions may be sustained it is necessary for the excepting party to show that some injustice has been done. *Ibid.*

Where, upon an exception to a part of the charge of a judge, the part of the charge excepted to appears to be obscure but the rest of the charge is not set forth nor described, it cannot be said that the part of the charge excepted to may not have been made plain by the rest of the charge, and the mere obscurity of that part of the charge taken by itself does not show error affirmatively, as an excepting party must do in order that his exception should prevail. *Farnum v. Ramsey*, 286.

Where, at the trial of an action against a street railway corporation for personal injuries, the plaintiff was allowed to introduce in evidence certain rules of the defendant, but there was no evidence of any violation of any of these rules, certain instructions of the judge, allowing the jury to consider the rules under certain conditions, were held to have been error. *London v. Bay State Street Railway*, 480.

At the trial of an action by a bailor against a gratuitous bailee for damages resulting from the fact that the defendant in shipping the bailed goods by express to the plaintiff stated to the express company as their value \$50 when the goods were worth over \$280, it was held that a rule laid down by the judge in his charge would impose upon the defendant liability for simple negligence when he was liable only for bad faith or gross negligence, and that the instruction was erroneous. *Altman v. Aronson*, 588.

At the trial above described, the only evidence of the standard of care exercised by the defendant toward his own goods of similar character was from one of his own employees and tended to show the same degree of care as that shown as to the bailed goods and it was held that, since the jury might disbelieve this testimony, they, having no other evidence on the subject, might be unable to find bad faith on the part of the defendant and would need some guide as to what rule they should follow; and that the judge's

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instruction, giving the rule as to ordinary negligence, which then would be their only guide, therefore was prejudicial to the defendant. *Altman v. Aronson*, 588.

Jury's duty under judge's instructions.

In an action against a street railway company for personal injuries, where the judge sufficiently and accurately had stated to the jury the relative rights of a pedestrian on a highway and of a street railway company operating a car upon its tracks on the highway, it was held that this subject was covered sufficiently by the judge's charge and that it was the duty of the jury to consider the particular circumstances of the case as shown by the evidence to have existed at the time of the accident, as they correctly were told to do by the judge. *Sawyer v. Worcester Consolidated Street Railway*, 215.

Presumption that instructions by the trial judge were followed by the jury. *Dempsey v. Goldstein Brothers Amusement Co.* 461.

#### *Finding by Judge.*

Where a case is tried before a judge without a jury, a finding of fact by the judge warranted by the evidence is final. *Crocker v. Lowell*, 249.

#### *New Trial.*

Exceptions to rulings of law made upon a motion for a new trial can be taken only to rulings upon questions which arise for the first time at the hearing upon such motion. *Murray v. Liebmann*, 7.

If the judge presiding at a trial, during the course of the closing argument of the counsel for the plaintiff, by motions of his head shows dissent from the counsel's statements and the plaintiff does not except to such conduct of the judge before the verdict, the propriety of such conduct cannot be brought before this court for determination by an exception to a refusal to grant a motion for a new trial based upon such alleged impropriety. *Ibid.*

The trial of an action lasted six weeks and was complicated by the elimination, upon an election of the plaintiff at the close of the evidence, of two of the counts of the declaration and of much of the auditor's reports. The defendant moved for a new trial and the motion was overruled; and it was said that, as a practical matter, if it had appeared to the presiding judge that the defendant's rights had not been safeguarded properly by the jury, it was to be presumed that the motion for a new trial would have been granted. *Matthews v. New York Central & Hudson River Railroad*, 10.

At the trial of the action above described, the judge submitted to the jury four questions calling for the assessment of damages as to four distinct elements. Upon the return of their answers, he ordered them to return a general verdict for the plaintiff which included the sums found by them in answer to the last two questions, but, subject to exceptions by the plaintiff, excluded the sums found in answer to the first two questions. This court held that the damages found in answer to the first question should have been included in the general verdict. It appeared that there was evidence warranting that answer, and it further was held that it was unnecessary to order a new trial of that single question of damage, but that the amount found in answer to

the first question should be added to the general verdict and that judgment should be entered accordingly. *Matthews v. New York Central & Hudson River Railroad*, 10.

Upon a report by the trial judge of an order granting a new trial of an action on a policy of life insurance on the ground of newly discovered evidence which was found after the trial by an agent of the defendant, who before the trial had spent about a month in trying to ascertain the facts, it was held that there had been no abuse of discretion by the trial judge in granting the motion for a new trial and that the case should stand for trial. *Berggren v. Mutual Life Ins. Co. of New York*, 173.

In the case above described it was said that, even if the newly discovered evidence were cumulative, that alone would not be decisive against granting the motion for a new trial. *Ibid.*

In the same case it was held that, although it was shown that the affiant previously had made assertions inconsistent with some of those contained in his affidavit, this was not conclusive against his credibility as a witness. *Ibid.*

In the same case it appeared that one witness at least had been called at the trial who knew or might have known that the facts disclosed in the affidavit were within the knowledge of the affiant, and it was held that, although this was a matter to be considered, it was not a controlling reason for denying the motion for a new trial. *Ibid.*

In the same case it was held that the circumstance, that the affiant and his knowledge of material facts were discovered by an agent of the defendant who had searched for evidence before the trial, although a matter to be considered, was not conclusive against granting the motion for a new trial, especially as this agent testified orally before the judge at the hearing of the motion for a new trial and the judge thus was better able than any one else to decide whether the agent was honest and trustworthy. *Ibid.*

In the same case it was held that it was proper for the judge to take into account the strength or weakness of the plaintiff's case at the trial in passing upon the defendant's motion for a new trial. *Ibid.*

Upon an exception to an order of a judge denying a motion for a new trial, the excepting party cannot raise for the first time an objection to the sufficiency of an instruction of the judge to the jury on a certain point in regard to which he had raised no question at the trial. *Sawyer v. Worcester Consolidated Street Railway*, 215.

Where in an action at law a verdict was returned for the plaintiff and exceptions, alleged by the defendant, were sustained by a decision of this court, in order to entitle the plaintiff to go to the jury at a new trial of the case upon the same issues he must produce evidence which, if it had been presented at the former trial in addition to the evidence then produced, would have required this court to make a different decision. *Clark v. New England Telephone & Telegraph Co.* 546.

#### *Exceptions.*

Exceptions to rulings of law made upon a motion for a new trial can be taken only to rulings upon questions which arise for the first time at the hearing upon such motion. *Murray v. Liebmann*, 7.

If the judge presiding at a trial, during the course of the closing argument of the counsel for the plaintiff, by motions of his head shows dissent from



the counsel's statements and the plaintiff does not except to such conduct of the judge before the verdict, the propriety of such conduct cannot be brought before this court for determination by an exception to a refusal to grant a motion for a new trial based upon such alleged impropriety. *Murray v. Liebmann*, 7.

A contention that, at a trial, the judge had given an instruction prejudicial to the defendant, where it appeared that the defendant did not call the attention of the judge to this objection to the instruction and took no specific exception to any part of the charge, was held, whether warranted by anything in the charge or not, not to be open to the defendant. *O'Neil v. National Oil Co.* 20.

Under the circumstances in the same case, where the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *Ibid.*

In an action against an electric light company for causing the death and conscious suffering of a boy, the jury found for the defendant on a count for conscious suffering and it was held that an exception by the defendant to the admission of certain alleged declarations of the boy under R. L. c. 175, § 66, must be overruled because these declarations had been made immaterial upon the count for conscious suffering by the verdict on that count; and they could not be considered as evidence in support of the count for causing death because the boy could not be found to have made intelligent declarations. *Jordan v. Adams Gas Light Co.* 186.

An exception to the admission of the testimony of an expert on electricity and its effect upon the human body, on the ground that the witness was not qualified properly as an expert, was overruled where the evidence as to the qualification of the witness was rather meagre but was not wholly absent and the excepting counsel had declined to cross-examine the witness upon that subject. *Ibid.*

In the case above described it was assumed, in the absence of any exception to any part of the judge's charge, that the judge properly had instructed the jury to disregard the alleged declarations if the boy did not suffer consciously. *Ibid.*

Upon exceptions to certain portions of the charge of a presiding judge, where the counsel for the excepting party did not call the judge's attention at the trial to any particular insufficiency or inaccuracy in his instructions to the jury and no complaint was made that further or different instructions were not given, in order that the exceptions may be sustained, it is necessary for the excepting party to show that some injustice has been done. *Sawyer v. Worcester Consolidated Street Railway*, 215.

Upon an exception to an order of a judge denying a motion for a new trial, the excepting party cannot raise for the first time an objection to the sufficiency of an instruction of the judge to the jury on a certain point in regard to which he had raised no question at the trial. *Ibid.*

Where a case is tried before a judge without a jury, a finding of fact by the judge warranted by the evidence is final. *Crocker v. Lovell*, 249.

Where, upon an exception to a part of the charge of a judge, the part of the

charge excepted to appears to be obscure but the rest of the charge is not set forth nor described, it cannot be said that the part of the charge excepted to may not have been made plain by the rest of the charge, and the mere obscurity of that part of the charge taken by itself does not show error affirmatively, as an excepting party must do in order that his exception should prevail. *Farnum v. Ramsey*, 286.

Upon an exception to a refusal to strike out an entire answer, it was pointed out that part of the answer was competent for all purposes, but that the request of the defendant's counsel was that the judge should order the whole of the witness's answer to be stricken out without separating the competent part, so that the refusal of the request by the judge afforded no ground for exception. *Dempsey v. Goldstein Brothers Amusement Co.* 461.

In an action where a verdict was ordered for the defendants and the plaintiff had alleged exceptions and it appeared that the jury were warranted in finding for the plaintiff against one of the joint defendants without considering certain evidence which the defendant contended was incompetent, it was held that it was not necessary to pass upon the question, whether such evidence should be considered or upon the competency of the evidence thus admitted. *Johnstone v. Cochrane*, 472.

Statements in the judge's charge were held to be insufficient to cure the error committed in a certain argument by a plaintiff's attorney to the jury and exceptions of the defendant therefore were sustained. *London v. Bay State Street Railway*, 480.

Where, at the trial of an action against a street railway corporation for personal injuries, the plaintiff was allowed to introduce in evidence certain rules of the defendant, but there was no evidence of any violation of any of these rules, certain instructions of the judge allowing the jury to consider the rules under certain conditions were held to have been error. *Ibid.*

In the same case it was held that the defendant's counsel, by taking an exception to the improper portion of the argument and asking the judge to instruct the jury to disregard it, had saved the defendant's right to have its exception sustained unless the judge cured the error that had been committed, which he did not do. *Ibid.*

Where in a bill of exceptions in an action of contract it was stated as a material fact, that the plaintiff was elected president of a Massachusetts business corporation, it was taken, in the absence of any statement to the contrary, that the plaintiff was elected as such president under St. 1903, c. 437, § 18, and therefore that he was elected for the term of one year. *Moss v. Cope-lop*, 513.

No exception to the exclusion of an answer to a question can be sustained where the bill of exceptions does not state what answer was expected. *Flynn v. Lewis*, 550.

Charge which was prejudicial to the defendant in an action against a gratuitous bailee because it in effect permitted the jury to find the defendant liable if merely negligent, instead of permitting them to find him liable only if he had acted in bad faith or was grossly negligent. *Altman v. Aronson*, 588.

#### Report.

By R. L. c. 173, § 108, as amended by St. 1912, c. 317, the power of a judge of the Superior Court, after the death of another judge of that court who had

Practice, Civil (*continued*).

presided at a trial, to report the case thus tried for determination by this court, is confined expressly to cases where the trial judge had reserved the case for report and failed by reason of his death to make such report. *Walters v. Jackson & Newton Co.* 247.

Therefore, in a case where there was no request to the trial judge to report the case and no decision by him to make a report, another judge has no power to report the case after his death. *Ibid.*

#### *Appeal.*

Where upon a record presented to this court upon an attempted appeal it appeared that no question was pending, it was ordered that the case should be dismissed from this court. *Bulland v. Hein*, 242.

On an appeal from a decree made by a judge of the Superior Court establishing a lien under St. 1909, c. 490, Part II, §§ 74, 75, for the amount of the respondent's proportion of taxes on certain real estate which had been paid by the petitioner as cotenant and ordering a sale of the respondent's interest in the real estate, a memorandum of decision made by the judge is not a part of the record, and, if printed with the record of the appeal, it must be disregarded by this court. *Naylor v. Nourse*, 341.

### PRACTICE, CRIMINAL.

#### *Grand Jury Proceedings.*

An indictment found and returned by a grand jury upon testimony given before them by witnesses in the presence of other witnesses is a violation of art. 12 of the Declaration of Rights, although no person not a member of the grand jury was present while that body was deliberating upon the evidence presented. *Commonwealth v. Harris*, 584.

A plea in abatement to an indictment for crime on the ground that, while the grand jury were hearing testimony upon the subject matter of the indictment, other witnesses than the witness testifying were present in the grand jury room, must be sustained although it appears that such witnesses were present solely for the purpose of testifying and it is not shown that the defendant suffered any harm from their presence. *Ibid.*

#### *Continuing Offence.*

Where a complaint under R. L. c. 76, § 8, charges the defendant with unlawfully holding himself out as a practitioner of medicine between two dates named, the complaint is for a continuing offence and the time during which the defendant is charged with having committed a series of acts is a material part of the offence described, and accordingly evidence of acts committed by the defendant before the time specified must be excluded. *Commonwealth v. Runge*, 598.

The provisions of R. L. c. 218, § 20, in regard to allegations of the time of the commission of a crime are not made applicable to continuing offences where time "is an essential element of the crime." *Ibid.*

#### *Conduct of Trial.*

Defendant's right, if any, to complain of the earlier part of the judge's charge at the trial on a complaint under R. L. c. 76, § 8, for practising medicine with-

out being lawfully authorized to do so and without being registered as required by law, was held to have been removed by certain further instructions of the judge that immediately followed. *Commonwealth v. Runge*, 598.

## PROBATE COURT.

### *Sale of Land for Distribution.*

Purpose and conduct of an administrator in prosecuting to a decree a petition under R. L. c. 146, § 18, as amended by St. 1907, c. 236, (St. 1917, c. 296, not then having been enacted,) for leave to sell the whole of the land of the intestate for purposes of distribution to a person named by him for a price greatly below its value, after the heirs had sold all the land in question to other persons and had no interest therein remaining, was held to constitute a fraud upon the court, so that, upon a petition of successors in title to grantees from the heirs of different portions of the land, filed eight months after the entry of the decree, the Probate Court properly might revoke such decree. *Child v. Clark*, 3.

### *Revocation of Decree.*

Purpose and conduct of an administrator in prosecuting to a decree a petition under R. L. c. 146, § 18, as amended by St. 1907, c. 236, (St. 1917, c. 296, not then having been enacted,) for leave to sell the whole of the land of the intestate for purposes of distribution to a person named by him for a price greatly below its value, after the heirs had sold all the land in question to other persons and had no interest therein remaining, was held to constitute a fraud upon the court, so that, upon a petition of successors in title to grantees from the heirs of different portions of the land, filed eight months after the entry of the decree, the Probate Court properly might revoke such decree. *Child v. Clark*, 3.

The standing of such successors in title to grantees from the heirs of portions of the land affected by the decree for sale as petitioners for the revocation of the decree thus procured by a fraud on the court is not dependent upon any statutory provision and cannot seriously be questioned. *Ibid.*

### *Appeal.*

An order of a single justice of this court denying a petition for leave to enter late an appeal from a decree of the Probate Court on the grounds that the petition was not filed within the time allowed by R. L. c. 162, § 14, and that, if it had been, the petitioner had not brought himself within the requirements of § 13 cannot be reviewed on appeal in the absence of any report of the evidence. *O'Neill v. O'Neill*, 258.

## PROXIMATE CAUSE.

In a claim under the workmen's compensation act, a finding of the Industrial Accident Board, that the death of an employee of a coal dealer from the bursting of his aortic artery was not caused by a fall on the ice when he was delivering coal more than three months before, is a finding of fact, and where,

Proximate Cause (*continued*).

as in the present case, there was evidence warranting the finding, it is not subject to revision by this court. *Knight's Case*, 142.

In an action by an executor against a street railway corporation for causing the death of the plaintiff's testator by running into him with a car which he knew was approaching, failure to ring a bell or sound a whistle to give notice of the car's approach was held to be immaterial, because the testator knew of the car's approach. *Anger v. Worcester Consolidated Street Railway*, 163.

A person, watching and waiting for an approaching electric street railway car and signalling for it to stop, in an action against the street railway corporation for injuries caused by its running board striking him, cannot contend that the defendant's motorman was negligent in failing to sound a gong or blow a whistle to give notice of the car's approach. *Daigneau v. Worcester Consolidated Street Railway*, 166.

In a claim of a dependent widow under the workmen's compensation act, where the deceased employee in the course of his employment dropped a plank on the great toe of his left foot, injuring the toe severely, and three or four days later died at a hospital of septicemia, a finding by the Industrial Accident Board on conflicting evidence awarding compensation, which was confirmed by the Superior Court, was not disturbed on appeal. *Mallory's Case*, 225.

A finding by the Industrial Accident Board, that the death of an employee from acute miliary tuberculosis did not result from abrasions on his leg and foot received four months and a half earlier in the course of and arising out of his employment, is a finding of fact which will not be disturbed, if warranted by the evidence, as it was in the present case. *McCarthy's Case*, 259.

Upon a claim under the workmen's compensation act by the dependent widow of an employee, who collapsed and fell to the ground when he was swinging a heavy sledge hammer in breaking stones and died about five minutes later, it was held that a finding by the Industrial Accident Board that the cause of the employee's death was conjectural, being one of fact, could not be set aside, there having been evidence to support it. *Weatherbee's Case*, 297.

In a claim under the workmen's compensation act by the dependent of an employee, who was found dead with his throat cut by a dangerous machine on which he worked and into which he had fallen, the burden of proof is upon the dependent to show that the employee was alive when he fell into the machine. *Dow's Case*, 348.

Application of the foregoing principle in a claim by the dependent of a boy nineteen years of age, who when employed as a tender of a beaming machine, fell into it, and the Industrial Accident Board found that the "evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time," and awarded compensation to the dependent, it being held that this court could not say as matter of law that the conclusion of the board was unsupported by the evidence. *Ibid.*

In the same case it was contended by the insurer that, assuming that the employee was alive when he struck the machine, the cause of his fall was the proximate cause of his death and that the cause of his fall was unknown or conjectural, but it was held that the cause of his fall was the remote cause and that the fall itself was the dominant and proximate cause of the injury that resulted in death. *Ibid.*

In an action for personal injuries caused by the negligence of the defendant in knocking down the plaintiff with a motor car and breaking his leg, evidence that when the plaintiff at a hospital was attempting to get out of a wheel chair one of his crutches slipped and he fell back into the chair, breaking the same bone at the place of the original fracture, was admitted properly, as the jury could find that the second fracture was a natural and proximate result of the first injury. *Hartnett v. Tripp*, 382.

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury, but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release. *Purchase v. Seelye*, 434.

In the same case it was said that it was unnecessary to consider, whether the railroad corporation would have been liable for the aggravation of the plaintiff's injury caused by the defendant's mistake in operating on the wrong side if there had been no mistake in regard to the identity of the patient. *Ibid.*

It was held that evidence tending to show that employees of a corporation undertaking the repair of a boiler for a city used a defective chain to hoist the boiler from a wagon of the city in which it had been driven to the repair shop, where it was left suspended, would not warrant a finding that the negligent using of the defective chain was the cause of damage caused by the horses, who had been left unattended and with feed bags on, running away when the chain broke and the boiler fell, if there is no evidence that the employees of the corporation knew that the horses of the city had had their bits removed and were unattended or that they were to remain on the corporation's premises after the boiler had been unloaded. *Sabin v. Cambridge Iron Works*, 511.

On the evidence at the trial of an action against a railroad corporation by the administratrix of the estate of one who was killed while engaged in the performance of his duties as a signal foreman of the defendant's block signal system, when he was inspecting a dwarf signal by a track near a station and was struck by a freight train which emerged from under a bridge under which a passenger train had passed leaving a cloud of smoke and steam so dense that one could not see ahead from the freight engine for a distance of twenty feet, it was held that there was no evidence that negligence on the part of the fireman of the freight train caused the death of the plaintiff's intestate, since, if he had been on watch as required by rules of the defendant, he could not have seen the plaintiff's intestate in time to prevent the accident. *Casey v. Boston & Maine Railroad*, 529.

For the same reason it was held that there was no evidence that the death of the plaintiff's intestate was caused by a failure of the head brakeman, who was sitting in the fireman's seat in the engine, to perform his duties, which were to be looking out ahead and to signal to any one from the engine and "to give a signal to get out of the way, if he saw any one working on the track that apparently" the train was "getting too close to." *Ibid.*

## PUBLIC OFFICER

The board of aldermen of a city in granting to a street railway corporation under the authority given by St. 1874, c. 29, § 11, Pub. Sts. c. 113, § 21, an extension of the location of its tracks in that city and imposing a certain condition as to repair of such portions of the streets, roads and bridges, respectively, as are occupied by its tracks were to act as public officers and not as agents of the city. *Northampton v. Northampton Street Railway*, 540.

## RAILROAD.

An engineman of a freight train has a right, in the operation of his engine, to assume that signal men of his employer who are thoroughly familiar with the location of the tracks and the movements of both freight and passenger trains will take reasonable precautions to ensure their own safety. *Casey v. Boston & Maine Railroad*, 529.

See also NEGLIGENCE, Railroad.

## RECORD.

See that subtitle under EQUITY PLEADING AND PRACTICE.

## REFERENDUM.

In making legislative provision for the apportionment of public burdens among different municipalities, although it has been the custom of the General Court usually to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, this has not always been done and it is not necessary under the Constitution. *Opinion of the Justices*, 603.

## RELEASE.

In an action against one of two joint tortfeasors, it appeared that before the action was brought the plaintiff had brought an action for her injuries against the other tortfeasor, which she discontinued under an agreement by which she covenanted with the landowner not to sue him and received from him the sum of \$1,500, the instrument reciting that it did not release the plaintiff's cause of action against any one other than the landowner, and it was pointed out that the defendant, not being a party to the instrument, could introduce oral evidence to show that the plaintiff accepted the money in release of all claims against her employer. *O'Neil v. National Oil Co.* 20.

In the above case it also was pointed out that, although there was evidence which would have warranted such a finding, this was a question of fact for the jury and that they had a right to find that the money was not accepted for this purpose. *Ibid.*

Under the circumstances in the same case, where the jury found for the plaintiff in the sum of \$5,000, an exception by the defendant to a refusal of the judge to instruct the jury that, if they found any liability on the part of the defendant, they must consider the payment of \$1,500 by the landowner in

mitigation of damages, was sustained unless the plaintiff within a time named should remit the amount of the verdict in excess of \$3,500. *O'Neil v. National Oil Co.* 20.

Release by an employee of a railroad corporation, who in the course of his work had suffered a rupture in his right groin, of the corporation from all claims and demands "arising or which may arise out of said injury," was held not to discharge from liability for negligence a surgeon, who had made a mistake in operating on the wrong side for the rupture, such act not being a natural and probable result of the first injury, but creating a new and independent cause of action, for which the original wrongdoer was in no way responsible and which consequently was not barred by the release. *Purchase v. Seelye*, 434.

### RELIGIOUS SOCIETY.

Information in equity by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, to determine the beneficiaries under a certain trust deed, and particularly the relator's rights to enforce the provisions of that deed, and to remove certain trustees. *Attorney General v. Armstrong*, 196.

### REPLEVIN.

In an action of replevin against the mortgagee of a chattel which the plaintiff has a right to redeem upon a proper payment or tender, it seems that a tender made at the time that the chattel is taken upon the replevin writ comes too late, as the writ already has been issued, and in the present case, where there was a previous valid tender, a further tender at the time of the service of the writ was disregarded by this court. *Pokross v. Champagne*, 391.

### RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

### RES JUDICATA.

An order of the Superior Court dismissing a petition under R. L. c. 51, §§ 15, 16, for the assessment of damages caused to the petitioner's land by repairs upon a public way on which the land abuts, made on the ground that no petition for compensation had been filed with the mayor and aldermen "after the commencement and within one year after the completion of the work" which caused the alleged damage, as required by the statute, is not a bar to a new petition for damages to the petitioner's land caused by the same repairs, which is filed after a compliance with the requirements of the statute. *Warner v. Pittsfield*, 138.

In an action in the Superior Court for alleged breach of a contract in writing to employ the plaintiff as a salesman for one year at a salary payable weekly and further compensation at the end of the term, the defendant set up the alleged defence that the plaintiff broke his contract and that the defendant discharged him rightly for that reason, but it was held that this issue was *res judicata* against the defendant by a judgment of the Municipal Court of the City of Boston in favor of the plaintiff in an action upon an account an-



*Res Judicata (continued).*

nexed, the first three items being for weekly instalments of salary, wherein the judge of the Municipal Court had found that the plaintiff was discharged by the defendant without justification. *Dalton v. American Ammonia Co.* 430.

#### RESTAURANT KEEPER.

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J.*, dissenting. *Friend v. Childs Dining Hall Co.* 65.

In an action of contract against a restaurant keeper for furnishing food to the plaintiff to be eaten on the premises which was not fit to eat, it was said that, assuming that the provision of the sales act contained in St. 1908, c. 237, § 15 (3), applied to such an action, and that, contrary to the circumstances of the case, it was the plaintiff's duty to examine the food before eating it, it would be a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered. *Ibid.*

In an action of tort against a restaurant keeper for negligence in furnishing food not fit to eat, the burden is on the plaintiff to show that the defendant failed to use due care to furnish wholesome food fit to eat. *Ash v. Childs Dining Hall Co.* 86.

The presence in a piece of blueberry pie, served in a restaurant as food, of a very thin black tack a little longer than a carpet tack with a very small flat head a little larger than a pin head is not in itself evidence of negligence on the part of the restaurant keeper, whose servants made the pie from blueberries that were purchased by the manager of the restaurant keeper in a quart basket made of wood fastened with such tacks. *Ibid.*

In the case in which the points above stated were described, it was said that no question was raised as to the contractual relation between the parties. *Ibid.*

#### SALE.

##### *What constitutes.*

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J.*, dissenting. *Friend v. Childs Dining Hall Co.* 65.

In an action of contract for the price of coal alleged to have been sold by the plaintiff to the defendant, which the defendant testified that he bought from a third person individually, although such person was alleged by the plaintiff to have been his agent, where the jury found for the defendant, it was held that the plaintiff was not aggrieved by a refusal of the judge at the trial to rule, that, if the defendant used the coal after notice from the plaintiff that the coal was his and not the third person's or if the circumstances ought to have led the defendant to believe that it was the plaintiff's coal, the defendant was liable. *Farnum v. Ramsey*, 286.

On the evidence at the trial of an action for the price of five tons of coal, where the defendant testified that he bought the coal from a person other than the plaintiff and paid for it by crediting the price as part of the purchase money for a motor cycle which he delivered to such person under a contract of conditional sale, it was held that the judge properly refused to rule that, "There is no evidence on which the jury can find that [the third person] was authorized as the plaintiff's agent to purchase any motor cycle with title to be conferred upon said [third person] at the time of the purchase." *Farnum v. Ramsey*, 286.

#### Warranty.

It was held that, by reason of a covenant in a bill of sale in writing and under seal of the good will of a garage and its equipment, in the absence of fraud inducing the sale, the purchaser could not maintain an action of contract against the seller for breach of an oral warranty as to the cost of the equipment purchased. *Carpenter v. Sugden*, 1.

Where a restaurant keeper in response to the order of a guest furnishes food to be eaten on the premises, whether or not the transaction constitutes a sale, there is an implied contract on the part of the restaurant keeper that the article furnished as food is fit to eat. *CROSBY, J.*, dissenting. *Friend v. Childs Dining Hall Co.* 65.

Under the provision of the sales act contained in St. 1908, c. 237, § 15 (1), which in this respect is declaratory of the common law, a dealer who sells for food to a customer a sealed can of baked beans containing among the beans a pebble that looks like a bean, which breaks a tooth of the purchaser, can be found to be liable to the purchaser in an action of contract for his injuries thus sustained, there being in such a sale by a dealer, under the statute as at common law, an implied warranty that beans so purchased for food "shall be reasonably fit for such purpose." *CROSBY, J.*, dissenting. *Ward v. Great Atlantic & Pacific Tea Co.* 90.

#### Return of Goods.

A purchaser, who, upon examining goods shipped to him to fulfil a contract of sale by sample, discovers that the goods do not conform to the sample and reships them to the seller, in doing so is a gratuitous bailee of the goods. *Altman v. Aronson*, 588.

#### Conditional.

Where chattels were sold under a contract of conditional sale and the buyer made default in payments and the seller took possession by an action of replevin of what was left of the property in the hands of the buyer, this was an election by the seller to treat the transaction as no sale, and he cannot afterwards maintain an action of contract for the balance of the purchase money. *Schmidt v. Ackert*, 330.

Nor under such circumstances can the seller maintain an action against the buyer to recover the value of the buyer's use of the chattels while in his possession in excess of the payments made by him, the rights of the parties being defined by their express contract in writing and there being no basis for such an implied contract to pay for the use of the chattels. *Ibid.*

In an action against a married woman, who carried on a teaming business on her separate account, for the causing of the death of a pedestrian who was

*Sale (continued).*

run into by a motor car bought under a contract of conditional sale made in the name of the defendant's husband, it was held that it was error for the presiding judge to order a verdict for the defendant on the ground that there was not sufficient evidence that the defendant owned the motor car at the time of the accident, because the jury could have found that the husband held only a nominal title to the car in the right of his wife, and the question of ownership should have been left to the jury. *Goldrick v. Lacombe*, 397.

On the evidence at the trial of an action of tort for negligence brought by a baker against a manufacturer of ovens, for damage resulting from the breaking out of a fire around an oven installed by the defendant under a contract in writing of conditional sale made with the plaintiff, it was held that the plaintiff was entitled to go to the jury. *Barabs v. Duhrkop Oven Co.* 466.

*Tax Sale.*

See TAX.

### SAVINGS BANK.

Savings department of trust company, see TRUST COMPANY.

### SEWER.

A claim of a landowner against a town for damages for the taking of an easement in his land for the construction of a sewer is a chose in action which does not pass by a deed of the land. *Howland v. Greenfield*, 147.

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, was held to constitute a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Ibid.*

### SHIP.

Action for personal injuries received by a longshoreman in unloading a ship, *Duart v. Simmons*, 313.

A master stevedore, who has been employed by the owner of a vessel to unload her, is bound to exercise reasonable care not to injure one who has been appointed custodian of the vessel by the United States marshal of the district and is lawfully on board of the vessel in that capacity. *Sughrue v. Booth*, 538.

### SMOKE.

Action of tort against a railroad corporation for damages caused to property of the plaintiffs, trustees, adjacent to a railroad by unnecessary and unreasonable excess of smoke, soot and cinders from the defendant's locomotives. *Matthews v. New York Central & Hudson River Railroad*, 10.

## SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

There is no question of the constitutionality of U. S. St. 1918, c. 20, called the soldiers' and sailors' civil relief act, it being a war measure within the power of Congress and therefore the supreme law of the land governing the foreclosure of mortgages of real estate within the territorial limits of the Commonwealth. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

The benefit of the provision of the soldiers' and sailors' civil relief act contained in § 302 of U. S. St. 1918, c. 20, is not limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes. *Ibid.*

Under U. S. St. 1918, c. 20, § 302, cl. 3, no sale of land under a power of sale in a mortgage is valid if made during the military service of the owner of the land or within three months thereafter unless such sale is ordered by a court. *Ibid.*

The fact, that an agent of a person in the military service of the United States, who had charge of land beneficially owned by such person subject to a mortgage, had full knowledge of a foreclosure sale and acquiesced in and actively approved of it, does not deprive such military owner of his right given by U. S. St. 1918, c. 20, § 302, because the right is a personal one which cannot be waived by an agent. *Ibid.*

Assuming that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a mortgage of real estate containing a power of sale, the existence of the soldiers' and sailors' civil relief act is a special circumstance which gives the courts of equity in this Commonwealth jurisdiction to foreclose such mortgages made within the time specified in the act. *Ibid.*

## STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTES CITED AND EXPOUNDED.

See page 785.

## STREET RAILWAY.

The board of aldermen of a city, in granting to a street railway corporation under the authority given by St. 1874, c. 29. § 11, Pub. Sts. c. 113, § 21, an extension of the location of its tracks in that city and imposing a certain condition as to repair of such portions of the streets, roads and bridges, respectively, as are occupied by its tracks, acted as public officers and not as agents of the city, so that the acceptance of the location by the street railway corporation did not constitute a contract of the corporation with the city that it would comply with the conditions of the grant. *Northampton v. Northampton Street Railway*, 540.

Street Railway (*continued*).

Extent of recovery by a city in an action against a street railway corporation given in compliance with a condition imposed by the grant of an extension of location made to it by the aldermen of the city upon a bond as it related to the cost of maintenance of certain bridges. *Northampton v. Northampton Street Railway*, 540.

Constitutionality of Spec. St. 1918, c. 159, and of certain proposed legislation providing in substance for the temporary operation, by trustees appointed by the Governor, of the lines of the Boston Elevated Railway Company and the payment of deficiencies thereby arising and of dividends to stockholders by taxation and assessments upon municipalities chiefly benefited. *Opinion of the Justices*, 603.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

### STRIKE.

In a suit in equity against the members of a labor union to enjoin them from interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff, if it appears that one of the purposes of the strike was an unlawful purpose, it is not necessary to consider the legality of another alleged purpose of the strike, because a strike for both a lawful and an unlawful purpose is illegal. *Baush Machine Tool Co. v. Hill*, 30.

Where, in such a suit in equity there were two hundred and fifty defendants, all members of the union, and twenty-eight notified the plaintiff of "their renunciation of their combination or conspiracy to interfere with the plaintiff's business" for the purpose of unionizing the plaintiff's shop and their aiding or abetting the strike against the plaintiff for that purpose, but did not leave the union nor announce a purpose of doing so, and their notice contemplated that the unlawful strike continue in force and it did so continue, it was held that the motive for the twenty-eight continuing to be parties to an unlawful strike was immaterial and afforded no ground why they should not be enjoined with the other two hundred and twenty-two defendants from maintaining the unlawful strike. *Ibid*.

In the same case it was pointed out that, as the strike was for an unlawful purpose, it was not necessary to consider whether the means employed by the defendants were lawful or unlawful. *Ibid*.

### SUNDAY.

See LORD'S DAY.

### SUPERIOR COURT.

A judge of the Superior Court has power to make an order *nunc pro tunc* to amend past docket entries to accord with the facts. *Warner v. Pittsfield*, 138.

By R. L. c. 173, § 108, as amended by St. 1912, c. 317, the power of a judge of the Superior Court, after the death of another judge of that court who had presided at a trial, to report the case thus tried for determination by this court, is confined expressly to cases where the trial judge had reserved the

case for report and failed by reason of his death to make such report. *Walters v. Jackson & Newton Co.* 247.

Therefore, in a case where there was no request to the trial judge to report the case and no decision by him to make a report, another judge has no power to report the case after his death. *Ibid.*

### SUPERSEDEAS.

A writ of supersedeas, commanding the officer in whose hands an execution has been placed for service to refrain from further action thereon, takes effect from the time that the sheriff or constable in whose hands the execution has been placed for service has notice of such writ. *Keith v. Rosnosky*, 409.

Docket entries of a court from which a writ of supersedeas purports to have issued and an indorsement upon the bond signed by the clerk of the court, from which, it was held, it sufficiently appeared that all proper things were done by or by direction of the court and that it must be presumed that the court, having knowledge of the requirements of R. L. c. 193, § 17, approved the bond and the surety on the bond before ordering the supersedeas to issue. *Ibid.*

### SUPREME JUDICIAL COURT.

Effect of the appointment by the Supreme Judicial Court, in a suit in equity properly before it, of trustees under a trust deed which contained provisions as to perpetuation of the board, and tenure of office of trustees so appointed. *Attorney General v. Armstrong*, 196.

Where upon a record presented to this court upon an attempted appeal it appeared that no question was pending, it was ordered that the case should be dismissed from this court. *Buland v. Hein*, 242.

An attempted appeal to this court, not taken according to law, is not before the court and cannot be considered. *Martin's Case*, 402.

### SURETY.

In this Commonwealth, where the grantee in a deed assumes and agrees to pay a mortgage on the property conveyed, he becomes as between himself and his grantor the principal debtor for the payment of the mortgage debt assumed by him, and the mortgagor as to the grantee becomes a surety, although this does not bind the mortgagee unless he assents to it. *Codman v. Deland*, 344.

But, if thereafter the mortgagee, without the assent or knowledge of the mortgagor, makes an agreement in writing under seal with the grantee extending the time of payment of the mortgage note at an increased rate of interest, the mortgagee by such agreement accepts the grantee as the principal debtor and the mortgagor as a surety and, by the agreement to extend the time of payment contained in the same instrument, made without the knowledge of the mortgagor, discharges the mortgagor from his liability as surety. *Ibid.*

Where a surety company has become the surety upon a bond of a building contractor, given by him to a landowner for the faithful performance of a

*Surety (continued).*

contract to build a house on the land of such owner to be completed by November 1 of that year, if without the knowledge of the surety the landowner and the contractor make an agreement extending the time for the completion of the house until Christmas of that year the surety is discharged. *Schwartz v. American Surety Co. of New York*, 490.

Whether a surety on a bond for the faithful performance of a contract between a landowner and a building contractor can be held under any circumstances to have ratified a further contract made between the landowner and the contractor for their own benefit and convenience, or whether the principle of ratification has no application to such a case, here was mentioned as a question which it was unnecessary to pass upon because there was no evidence of the necessary elements of a ratification. *Ibid.*

The surety on a bond, which was given to ensure the faithful performance of an unlawful contract, cannot be held liable for a breach of the bond by the principal, because the courts will not enforce the obligation of an unlawful contract. *Boylston Bottling Co. v. O'Neill*, 498.

## TAX.

### *Referendum of Tax Legislation.*

In making legislative provision for the apportionment of public burdens among different municipalities, although it has been the custom of the General Court usually to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, this has not always been done and it is not necessary under the Constitution. *Opinion of the Justices*, 603.

### *On Income.*

Under St. 1918, c. 255, § 1, a corporation, which has paid to the United States a war excess profits tax for the year in question, in computing its net income for such taxation by this Commonwealth is to deduct the amount of such war excess profits tax paid by it, because under U. S. St. 1917, c. 63, § 29, the amount of such war excess profits tax is deducted from the net income of the corporation on which it is required to pay a tax to the United States. *American Printing Co. v. Commonwealth*, 237.

### *On Business Corporation.*

In computing the amount of the franchise tax to be imposed on a domestic business corporation, deposits of the corporation in excess of \$2,000 in the savings departments of trust companies, which can be withdrawn only on presentation of the pass-books in accordance with the provisions of St. 1908, c. 520, § 1, are "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation" and are to be valued accordingly by the Tax Commissioner under St. 1909, c. 490, Part III, § 43. *J. S. Lang Engineering Co. v. Commonwealth*, 367.

If by reason of error or misapprehension certain property of a domestic business corporation was omitted by the Tax Commissioner from his valuation under St. 1909, c. 490, Part III, § 43, of the taxable property of the corporation in a certain year, such omission affords no ground for contending that the error cannot be corrected in subsequent years. *Ibid.*

*Excessive.*

The general principle is well established, that relief against excessive taxation can be had only by abatement and that it is only where the whole tax is void that its invalidity can be shown by way of defence to an action to recover the tax. *Collector of Taxes of West Bridgewater v. Dunster*, 291.

The fact, that a will was contested and that it was not allowed by the Probate Court until the time fixed by St. 1909, c. 490, Part I, §§ 42, 72, 73, for the filing by the executor of a list of the taxable property of the estate for each of three successive years after the death of the testator had expired, does not give the executor, who filed no list and no petition for abatement, the right to set up an alleged excessive taxation of personal property in his hands as executor. *Ibid.*

In such a case the executor as matter of law had sufficient excuse for delay in filing a list and asking for an abatement until after the lapse of such time subsequent to his appointment as reasonably would enable him to ascertain the nature and amount of the property held by him as executor, and he had failed to file any list or any petition in abatement after that. *Ibid.*

In an action against an executor for the collection of such a tax under the circumstances named above, where the defendant was not permitted to show in defence that the tax was excessive, it was said that, as the executor had filed no list and no petition for an abatement, it was not necessary to inquire whether the provisions of the statute fixing the times for filing a list of taxable property and for filing a petition for abatement of a tax had any application at all to such a case. *Ibid.*

*Sale for Non-payment.*

A judge of the Superior Court has authority to allow the plaintiff in a suit in equity to redeem land from a tax sale to amend his bill into a bill to remove from the plaintiff's title a cloud created by a void tax sale or, if such tax sale shall be held to be good, to redeem from it. Prayers for such alternate relief properly may be joined in one bill. *Phelps v. Creed*, 228.

A bill in equity may be maintained by the owner of two lots of land to set aside a tax deed as a cloud upon his title, where the tax sale was of both lots, which were one mile apart, for a lump sum and the conveyance was by one deed stating the balance due for taxes in each of the successive years on the two lots together, the notice of the sale not conforming to R. L. c. 13, § 38, (now St. 1909, c. 490, Part II, § 39). *Ibid.*

*Redemption from Tax Sale.*

What effect, if any, St. 1915, c. 237, had on bills to redeem from lawful sales for non-payment of taxes which were pending when that statute took effect, here was mentioned as a question which did not arise in the present case, where a tax sale was set aside as unlawful. *Phelps v. Creed*, 228.

One who has an interest in land as a tenant for life in expectancy is entitled to redeem the land from a tax sale. *Isbell v. Greylock Mills*, 233.

*Abatement.*

The general principle is well established, that relief against excessive taxation can be had only by abatement and that it is only where the whole tax is



Tax (*continued*).

void that its invalidity can be shown by way of defence to an action to recover the tax. *Collector of Taxes of West Bridgewater v. Dunster*, 291.

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In such a case the executor as matter of law had sufficient excuse for delay in filing a list and asking for an abatement until after the lapse of such time subsequent to his appointment as reasonably would enable him to ascertain the nature and amount of the property held by him as executor, and he had failed to file any list or any petition in abatement after that. *Ibid.*

In the same case it also was said that it was not necessary to consider, whether the fact, that bonds of corporations and shares of corporate stock representing a considerable part of the estate of the testator were at the time of the testator's death in a safe deposit box in a city in another State in the hands of a custodian appointed under the laws of that State who had paid taxes thereon in such State, would have been a sufficient ground for abatement of a part of the taxes sought to be recovered, if that fact had been presented seasonably to the assessors of the taxing town in this Commonwealth. *Ibid.*

In an action against an executor for the collection of such a tax under the circumstances named above, where the defendant was not permitted to show in defence that the tax was excessive, it was said that, as the executor had filed no list and no petition for an abatement, it was not necessary to inquire whether the provisions of the statute fixing the times for filing a list of taxable property and for filing a petition for abatement of a tax had any application at all to such a case. *Ibid.*

#### *To support Public Utility and pay Dividends to Stockholders.*

Constitutionality of Spec. St. 1918, c. 159, and of certain proposed legislation providing in substance for the temporary operation, by trustees appointed by the Governor, of the lines of the Boston Elevated Railway Company and the payment of deficiencies thereby arising and of dividends to stockholders by taxation and assessments upon municipalities chiefly benefited. *Opinion of the Justices*, 603.

### TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

### TENDER.

In an action of replevin against the mortgagee of a chattel which the plaintiff has a right to redeem upon a proper payment or tender, it seems that a tender made at the time that the chattel is taken upon the replevin writ comes too late, as the writ already has been issued, and in the pres-

ent case, where there was a previous valid tender, a further tender at the time of the service of the writ was disregarded by this court. *Pokross v. Champagne*, 391.

## TOWNS.

See MUNICIPAL CORPORATIONS.

## TRESPASS.

An action of tort will not lie against a constable who, in serving an execution commanding him to put the owner in possession of certain premises occupied by the plaintiff and his family, removed the furniture, thus making it necessary for the plaintiff's wife and child to leave, and who in doing so "shut his fist and hollered and hollered" but did not come within striking distance of the plaintiff's wife and child. *Keith v. Rosnisky*, 409.

The owner of an easement in land is entitled to a mandatory injunction compelling the removal of structures that violate his right, although he has suffered no pecuniary damage. *Congregation Beth Israel v. Heller*, 527.

Mandatory injunction was issued directing one who had made an unjustifiable excavation in a private way to restore it to the condition in which it was before the trespass was committed. *Ibid.*

Actions by trespassers for personal injuries, see appropriate subtitle under NEGLIGENCE.

## TRUST.

*Oral.*

The defence that an oral contract for a sale of land or an interest therein or an oral trust concerning land is within the statute of frauds under R. L. c. 74, § 1, cl. 4, or R. L. c. 147, § 1, cannot be set up by a third person, the statute of frauds being a defence only to the parties to the contract, which they are not obliged to set up unless they choose to do so. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

*Construction of Instrument creating Trust.*

Information in equity by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, to determine the beneficiaries under a certain trust deed, and particularly the relator's rights, to enforce the provisions of that deed, and to remove certain trustees. *Attorney General v. Armstrong*, 196.

Under the provisions of a will disposing of the residue of the testator's estate it was held that each of the testator's four children held one quarter of the residue in trust, with unlimited powers of sale and reinvestment, to pay the income to himself or herself during his or her life with a remainder to his or her issue *per stirpes*, and that the trustees together could give a good title to real estate of the testator held by them in common without obtaining a license from the Probate Court. *Livermore v. Livermore*, 293.

Upon the construction of a will and codicil providing that, upon the death of both the testator's wife and daughter, trustees under the will should convey and transfer certain premises in trust to a church, but containing no express

Trust (continued).

provision in regard to the beneficial use of the homestead property during the lives of the testator's wife and daughter, it was held that a petition, filed after the death of the testator's widow and while his daughter was living, for the appointment of the trustees as trustees to hold and maintain the homestead property during the life of the testator's daughter and upon her death to convey it as above directed, should be granted. *Turner v. First Congregational Society of North Brookfield*, 414.

Provisions of a will giving the residue to the testator's wife and others as trustees with power to supply needs of the wife and of others (who died leaving the wife surviving), the remaining property to "be devoted to Missions & like good objects as they may think best & the principal shall go finally to the same or similar objects as my wife & daughter may decide knowing as they do my purpose," where the widow waived the provisions for her benefit in the will and continued to live, were held to create a valid trust for charitable purposes in so much of the residue of the testator's property as had not been required for the support of the individual beneficiaries. *Coffin v. Attorney General*, 579.

#### *Appointment and Removal of Trustee.*

Information in equity by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, to determine the beneficiaries under a certain trust deed, and particularly the relator's rights, to enforce the provisions of that deed, and to remove certain trustees. *Attorney General v. Armstrong*, 196.

Effect of the appointment by the Supreme Judicial Court, in a suit in equity properly before it, of trustees under a trust deed which contained provisions as to perpetuation of the board, and tenure of office of trustees so appointed. *Ibid.*

Upon the construction of a will and codicil providing that, upon the death of both the testator's wife and daughter, trustees under the will should convey and transfer certain premises in trust to a church, but containing no express provision in regard to the beneficial use of the homestead property during the lives of the testator's wife and daughter, it was held that a petition, filed after the death of the testator's widow and while his daughter was living, for the appointment of the trustees as trustees to hold and maintain the homestead property during the life of the testator's daughter and upon her death to convey it as above directed should be granted. *Turner v. First Congregational Society of North Brookfield*, 414.

#### *Administration.*

Under the provisions of a will disposing of the residue of the testator's estate it was held that each of the testator's four children held one quarter of the residue in trust, with unlimited powers of sale and reinvestment, to pay the income to himself or herself during his or her life with a remainder to his or her issue *per stirpes*, and that the trustees together could give a good title to real estate of the testator held by them in common without obtaining a license from the Probate Court. *Livermore v. Livermore*, 293.

One of the trustees referred to above bought with the proceeds of personal property received by him as trustee a parcel of real estate, which was con-

veyed to him as trustee, and he was instructed by this court that he held this purchase of real estate as trustee and not individually. *Livermore v. Livermore*, 293.

#### *Charitable.*

Information in equity by the Attorney General at the relation of the members of the Methodist Religious Society in Boston, to determine the beneficiaries under a certain trust deed, and particularly the relator's rights, to enforce the provisions of that deed, and to remove certain trustees. *Attorney General v. Armstrong*, 196.

#### *Capital and Income.*

See CAPITAL AND INCOME.

#### *Assent by Beneficiary to Probate Account.*

Assent by a beneficiary to a probate account of a trustee was held under the circumstances not to estop the beneficiary from contending that certain of the trust funds were income and not capital. *Smith v. Cotting*, 42.

#### *Trustee's Accounts.*

Suit in equity by beneficiaries against a co-beneficiary who also was the trustee for an accounting as to misappropriated property. *Schneider v. Hayward*, 352.

#### *Trustee's Liabilities.*

Where in a suit in equity against trustees holding property for the benefit of three beneficiaries, one of whom was one of the trustees, for an accounting, it appeared that the defendant who was both a trustee and a beneficiary misappropriated certain articles of personal property belonging to the trust, but afterwards delivered some of these articles to the other two beneficiaries, it was held that the acceptance by the other two beneficiaries did not estop them from requiring that defendant to account for a further large amount of like property misappropriated by her. *Schneider v. Hayward*, 352.

#### TRUST COMPANY.

In proceedings by stockholders and the directors of a trust company incorporated under the laws of this Commonwealth, comprising a declaration of a cash dividend and an issue of new stock at par to stockholders of record who were entitled thereto, which were designed "to accomplish substantially the same result as a stock dividend," it was held that, when the cash dividend was declared the surplus out of which it was to be paid became income for the use of the stockholders, and that a trustee who subscribed for and received the new stock for the dividend was accountable to a beneficiary for the money thus received. *Smith v. Cotting*, 42.

Under the circumstances, a distribution by the trust company above described of shares of the capital stock of another trust company which it previously had purchased because "it seemed necessary to control" such other trust company "in order to prevent its conduct in a manner which might be prej-

Trust Company (*continued*).

judicial to the interests of the" trust company that bought it, was held not in any sense to be a partial distribution of the capital of the trust company declaring it, but to be a dividend which should be delivered to a beneficiary for life under a trust receiving it as income, and not be added to the capital of the trust fund. *Smith v. Cotting*, 42.

In computing the amount of the franchise tax to be imposed on a domestic business corporation, deposits of the corporation in excess of \$2,000 in the savings departments of trust companies, which can be withdrawn only on presentation of the pass books in accordance with the provisions of St. 1908, c. 520, § 1, are "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation" and are to be valued accordingly by the Tax Commissioner under St. 1909, c. 490, Part III, § 43. *J. S. Lang Engineering Co. v. Commonwealth*, 367.

## UNION.

LABOR UNION, see that title.

## UNLAWFUL INTERFERENCE.

Where, in such a suit in equity, there were two hundred and fifty defendants, all members of the union, and twenty-eight notified the plaintiff of "their renunciation of their combination or conspiracy to interfere with the plaintiff's business" for the purpose of unionizing the plaintiff's shop and their aiding or abetting the strike against the plaintiff for that purpose, but did not leave the union nor announce a purpose of doing so, and their notice contemplated that the unlawful strike should continue in force and it did so continue, it was held that the motive for the twenty-eight continuing to be parties to an unlawful strike was immaterial and afforded no ground why they should not be enjoined with the other two hundred and twenty-two defendants from maintaining the unlawful strike. *Baush Machine Tool Co. v. Hill*, 30.

In a suit in equity against the members of a labor union to enjoin them from interfering with the plaintiff's business by aiding or abetting a strike in force against the plaintiff, if it appears that one of the purposes of the strike was an unlawful purpose, it is not necessary to consider the legality of another alleged purpose of the strike, because a strike for both a lawful and an unlawful purpose is illegal. *Ibid.*

In the same case it was pointed out that, as the strike was for an unlawful purpose, it was not necessary to consider whether the means employed by the defendants were lawful or unlawful. *Ibid.*

In an action by a building contractor against the members of a bricklayers' union for damages resulting from a conspiracy against the plaintiff and malicious interference with his business, in sending out a notice, in pursuance of a common purpose agreed upon by them in combination, that union masons would not work for the plaintiff until further notice as he "has been working Non Union Masons," the statement being false, it was held that the plaintiff was entitled to go to the jury. *Martineau v. Foley*, 220.

In the same case it also was held that the sending out of the false statement with intent to destroy the plaintiff's business was malicious within the legal meaning of that word, being without legal justification, and entitled the

plaintiff to recover substantial damages from each defendant who participated in the conspiracy irrespective of the degree of his activity in the wrongful acts. *Martineau v. Foley*, 220.

### WAIVER.

Conduct on the part of the owner of land in which an easement for the construction of a sewer was taken by a town without giving notice of the taking as required by statute and without filing the layout as also required by statute, was held to constitute a waiver of any right on the part of the landowner to object to the maintenance of the sewer in his land, which prevented his successor in title from maintaining a suit in equity against the town to enjoin the maintenance of the sewer or to recover damages for its maintenance. *Howland v. Greenfield*, 147.

An employee, having elected under St. 1911, c. 751, Part III, § 15, as amended by St. 1913, c. 448, to proceed against a person other than his employer for personal injuries, it was said that, the plaintiff's election of remedy having been complete before his notice to the insurer of his employer, it was not necessary to consider whether a subsequent notice of withdrawal to the insurer operated as a waiver of the claim to compensation. *Labuff v. Worcester Consolidated Street Railway*, 170.

In a claim under the workmen's compensation act, conduct of the insurer and failure by it to object that the notice to it was insufficient until the case was before this court on appeal, were held to render it unnecessary to consider the question of the alleged insufficiency of the notice, because this was not open to the insurer. *Mallory's Case*, 225.

The fact, that an agent of a person in the military service of the United States, who had charge of land beneficially owned by such person subject to a mortgage, had full knowledge of a foreclosure sale and acquiesced in and actively approved of it, does not deprive such military owner of his right given by U. S. St. 1918, c. 20, § 302, because the right is a personal one which cannot be waived by an agent. *Hoffman v. Charlestown Five Cents Savings Bank*, 324.

Where, for the purpose of redeeming a motor car from a mortgage, the mortgagor attempts to pay, not only the amount of the mortgage debt and interest, but also the amount of a bill for painting the car which the mortgagor has agreed to pay, but the mortgagee, in order to prevent the redemption, himself pays the painter's bill, which he does not owe, before the mortgagor can get a chance to pay it, this may be found to be a waiver by the mortgagee of the payment of the painter's bill by the mortgagor, and the tender by the mortgagor of the principal and interest of the debt entitles him to redemption. *Pokross v. Champagne*, 391.

The filing of a discontinuance by the plaintiff in a suit in equity is a waiver of a bill of exceptions previously filed by him. *Keown v. Keown*, 404.

Whether a surety on a bond for the faithful performance of a contract between a landowner and a building contractor can be held under any circumstances to have ratified a further contract made between the landowner and the contractor for their own benefit and convenience, or whether the principle of ratification has no application to such a case, here was mentioned as a question which it was unnecessary to pass upon because there was no evi-

dence of the necessary elements of a ratification. *Schwartz v. American Surety Co. of New York*, 490.

Whether there had been a waiver of a requirement of a countersignature to a contract was held not to be necessary to decide. *William J. McCarthy Co. v. Fuller*, 495.

## WANTON AND RECKLESS MISCONDUCT.

See WILFUL AND WANTON MISCONDUCT.

## WARRANTY.

See SALE.

## WATERCOURSE.

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, where it appeared that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, it was held that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the unauthorized diversion of the water. *Isbell v. Greylock Mills*, 233.

## WATER RIGHTS.

Suit in equity to enjoin infringement of an easement to draw water from a spring on land of another by means of a private aqueduct over land of a third person. *Wellington v. Rawson*, 189.

In a suit in equity by the owner of land through which flowed a natural brook, against a mill corporation, seeking to enjoin the defendant from diverting the waters of the brook for its own use and also for damages, where it appeared that the plaintiff had suffered no actual damages, the defendant's use of the water having left water enough for the plaintiff's needs, it was held that the plaintiff, although entitled to an injunction and to nominal damages, was not entitled to recover from the defendant more than nominal damages for the invasion of the plaintiff's right by the authorized diversion of the water. *Isbell v. Greylock Mills*, 233.

## WAY.

*Private.*

In an action against an oil company by a housemaid for personal injuries sustained on a foggy evening by falling into an excavation from which a gasoline tank had been removed by the defendant for repairs at the request of the owner of the land, who was the plaintiff's employer, when the plaintiff with two other housemaids was "getting an airing" by walking in the private driveway of their employer, it was held that it was the duty of the defendant, if shown to have made the excavation, to use reasonable care to guard the work and in a proper way to protect the employees of the landowner law-

fully using the driveway from the danger of falling into the hole. *O'Neil v. National Oil Co.* 20.

On the evidence at the trial of an action for personal injuries sustained when the plaintiff was eleven years of age by reason of a gate of the defendant falling upon him, where there was evidence that the plaintiff was on a private street after he had come out of the defendant's yard, it was held that it could be found that the plaintiff when injured was not a trespasser nor a mere licensee and that the defendant accordingly was required to take reasonable precautions in the maintenance and management of its gate not to injure the plaintiff when he was in this private street in the exercise of due care. *Barber v. C. W. H. Moulton Ladder Co.* 507.

The owner of the fee of land used as a private way, which he holds under a deed providing that the way is to be forever used as a passageway by him in common with owners and occupants of the land abutting thereon, may maintain a suit in equity against another owner of land abutting on the way, whose deed provides that he shall have "a free and uninterrupted right, use and privilege in" the way, and who has made an excavation in the way and has constructed a bulkhead there, such acts of the defendant being without excuse. *Congregation Beth Israel v. Heller*, 527.

The maintenance of such a suit is not precluded by the mere facts that other abutting owners placed in the way coal holes with covers and gratings for lighting cellars, nor by the fact, if it is a fact, that the defendant had a right to lay water pipes in the way. *Ibid.*

#### Public.

##### Rights of pedestrians.

A pedestrian upon a sidewalk which is a part of a public way, while stopping near the curb for the purpose of conversation with another pedestrian upon the sidewalk, has a right to assume that drivers of vehicles using the part of the way wrought for carriage travel will exercise ordinary precaution to avoid having their vehicles come into contact with him. *Murray v. Liebmann*, 7.

Instruction to the jury at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate by striking him with the front corner of a street railway car of the defendant, when the intestate on foot had turned to cross the track in front of the moving car, "that the car and the man had equal rights upon the street; neither had any right to the exclusion of the other," was held to be correct and sufficient. *Sawyer v. Worcester Consolidated Street Railway*, 215.

##### Defect.

In this Commonwealth it is settled that the mere failure of a city to provide and maintain proper lights in its streets is not a defect under the highway act, even if the way unlighted is dangerous. *Hill v. Boston*, 372.

If a city maintains as a public way an underground passageway, where no natural light can reach it, a failure to light a staircase forming a part of the way, by reason of which a traveller thereon is injured, does not give such traveller a right of action under R. L. c. 51, § 18. *Ibid.*

##### Regulation of use of State highways.

The Commonwealth, which has power to regulate the use of the State highways, can delegate the administration of such powers to cities and towns



Way, (*continued*).

which under St. 1917, c. 344, Part I, §§ 17, 21, contribute toward the repair and maintenance of the State highways and are given police jurisdiction over them. *Commonwealth v. Theberge*, 386.

Repair.

Petition for the assessment of damages caused by the repair of a public way by a city. *Warner v. Pittsfield*, 138.

Negligent use of.

See NEGLIGENCE, *In use of highway*.

## WIDOW.

The provisions contained in St. 1905, c. 256, in regard to setting out real estate to the widow, do not abridge nor qualify the nature of her interest. *Naylor v. Nourse*, 341.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, a widow, whose husband died intestate without issue leaving an estate worth less than \$5,000, takes upon his death a vested right in his real estate as his statutory heir. *Ibid*.

## WILFUL AND WANTON MISCONDUCT.

Statement by RUGG, C. J., of the rules in regard to negligence, gross negligence, and wilful, wanton and reckless conduct. *Altman v. Aronson*, 588.

## WILL.

Construction of wills, see DEVISE AND LEGACY.

## WITNESS.

*Cross-examination.*

At the trial of an action of tort against the New York Central and Hudson River Railroad Company for damages caused to property of the plaintiff adjacent to the railroad in Boston by unreasonable and unnecessary excess of smoke, soot and cinders from the defendant's locomotives, it is proper to exclude as immaterial questions asked of the plaintiff in cross-examination as to his applying during the period of the alleged wrongful acts of the defendant for an abatement of taxes on other properties belonging to him on different streets not nearer than a quarter of a mile to the property in question and not affected by the railroad. *Matthews v. New York Central & Hudson River Railroad*, 10.

At the trial of the action above described, by reason of a question asked by the defendant of a witness in cross-examination, it was held proper for the witness to testify on redirect examination that in one of the years covered by the action he had observed about one hundred engines on the New York, New Haven, and Hartford Railroad in the vicinity of Cumberland and Durham streets. *Ibid*.

In a suit in equity by beneficiaries under a trust against a co-beneficiary who also was the trustee to compel accounting for misappropriated articles, it

was held that it was within the discretionary power of the trial judge, upon the cross-examination of one of the three beneficiaries by the misappropriating defendant, to refuse to permit the witness to be asked how the articles set off to her and to the plaintiff compared in value with those received by the defendant, this being a collateral matter. *Schneider v. Hayward*, 352.

In an action for personal injuries, answer of a medical expert, called by the defendant, to a question on cross-examination, "Who asked you, doctor, to examine this woman?" "Mr. C, representing the Casualty Company of America, the manager," was held properly to have been permitted to stand, the judge instructing the jury not to take into account the fact that the defendant was insured, that this was "of absolutely no consequence." *Dempsey v. Goldstein Brothers Amusement Co.* 461.

#### *Before Grand Jury.*

An indictment found and returned by a grand jury upon testimony given before them by witnesses in the presence of other witnesses is a violation of art. 12 of the Declaration of Rights, although no person not a member of the grand jury was present while that body was deliberating upon the evidence presented. *Commonwealth v. Harris*, 584.

A plea in abatement to an indictment for crime on the ground that, while the grand jury were hearing testimony upon the subject matter of the indictment, other witnesses than the witness testifying were present in the grand jury room, must be sustained although it appears that such witnesses were present solely for the purpose of testifying and it is not shown that the defendant suffered any harm from their presence. *Ibid.*

#### *Expert.*

An exception to the admission of the testimony of an expert on electricity and its effect upon the human body, on the ground that the witness was not qualified properly as an expert, was overruled where the evidence as to the qualification of the witness was rather meagre but was not wholly absent and the excepting counsel had declined to cross-examine the witness upon that subject. *Jordan v. Adams Gas Light Co.* 186.

#### *Failure to Call.*

In an action against a street railway company for personal injuries, where, at the trial, the defendant's conductor was in court but neither the plaintiff nor the defendant called him as a witness, it was held that a request by the defendant for an instruction that, "Under the circumstances, and upon all the evidence in this case, the jury cannot properly draw any inference against this defendant from its failure to call as a witness . . . the conductor of the car involved in the accident," should have been given. *London v. Bay State Street Railway*, 480.

#### WORDS.

"Any purpose." See *Flood v. Hodges*, 252, 257.

"Dealer." See *Friend v. Childs Dining Hall Co.* 65, 77.

"Decree." See *Holcombe v. Creamer*, 99, 103, 104.

"Employer." See *Scribner's Case*, 132, 135.

Words (*continued*).

"Goods." See *Friend v. Childs Dining Hall Co.* 65, 79.

"Hearing." See *Keown v. Keown*, 404, 407.

"Liberty." See *Holcombe v. Creamer*, 99, 108, 109.

"Notice." See *Warner v. Pittsfield*, 138, 139, 140.

"Securities." See *J. S. Lang Engineering Co. v. Commonwealth*, 367, 369, 370, 371, 372.

"Use." See *Kelly v. Morrison*, 574, 577.

"Victualler." See *Friend v. Childs Dining Hall Co.* 65, 72, 81, 82, 83.

## WORKMEN'S COMPENSATION ACT.

### *In General.*

Discussion by Rugg, C. J., of the character of the workmen's compensation act contained in St. 1911, c. 751, and amendments thereto. *Duart v. Simmons*, 313.

### *Procedure.*

Waiver of objection to notice.

In a claim under the workmen's compensation act, conduct of the insurer and failure by it to object that the notice to it was insufficient until the case was before this court on appeal, were held to render it unnecessary to consider the question of the alleged insufficiency of the notice, because this was not open to the insurer. *Mallory's Case*, 225.

Report to Industrial Accident Board by subscriber.

Successive reports by a railroad corporation to the Industrial Accident Board, of an accident causing death, made in accordance with St. 1911, c. 751, Part III, § 18, (as amended by St. 1913, c. 746, § 1,) were held properly to have been treated, at the trial of an action for the causing of the death, as one entire report filed in compliance with the statutes. *Casey v. Boston & Maine Railroad*, 529.

Finding by Industrial Accident Board.

In a claim under the workmen's compensation act, a finding of the Industrial Accident Board, that the death of an employee of a coal dealer from the bursting of his aortic artery was not caused by a fall on the ice when he was delivering coal more than three months before, is a finding of fact, and where, as in the present case, there was evidence warranting the finding, it is not subject to revision by this court. *Knight's Case*, 142.

A finding by the Industrial Accident Board, that the death of an employee from acute miliary tuberculosis did not result from abrasions on his leg and foot received four months and a half earlier in the course of and arising out of his employment, is a finding of fact which will not be disturbed, if warranted by the evidence, as it was in the present case. *McCarthy's Case*, 259.

Upon a claim under the workmen's compensation act by the dependent widow of an employee, who collapsed and fell to the ground when he was swinging a heavy sledge hammer in breaking stones and died about five minutes later, it was held that a finding by the Industrial Accident Board that the cause of the employee's death was conjectural, being one of fact, could not

be set aside, there having been evidence to support it. *Weatherbee's Case*, 297.

#### Compromise agreement.

Where under the workmen's compensation act an injured employee and the insurer of his employer have reached an agreement in regard to the employee's compensation for his injury and have signed such agreement, the employee has no right to present his claim on the agreement before the Industrial Accident Board under St. 1911, c. 751, Part III, § 5, as amended by St. 1917, c. 297, § 2, unless the agreement was filed with the Industrial Accident Board and approved by the board as required by St. 1912, c. 571, § 9. *Courtney's Case*, 469.

#### Appeal.

In a claim of a dependent widow under the workmen's compensation act, where the deceased employee in the course of his employment dropped a plank on the great toe of his left foot, injuring the toe severely, and three or four days later died at a hospital of septicemia, a finding by the Industrial Accident Board on conflicting evidence awarding compensation, which was confirmed by the Superior Court, was not disturbed on appeal. *Mallory's Case*, 225.

The workmen's compensation act makes no provision for an appeal from a decision of the Industrial Accident Board to this court, giving a right of appeal to this court only from a decree of the Superior Court. *Martin's Case*, 402.

A paper filed in the Superior Court, relating to a decree of that court that was entered upon a claim under the workmen's compensation act, which is entitled "Objections to entry of decree by said Superior Court" and contains reasons for objections to the decree and a "motion for review," is neither in form nor in substance an appeal from the decree. *Ibid.*

A memorandum filed by a judge of the Superior Court, referring to the paper described above and stating, "I understood and regarded the respondent . . . as claiming and taking an appeal by this paper," does not make the paper an appeal, the judge having no power to give it this effect. *Ibid.*

In the same case the filing of further "Objections to entry of decree by said Superior Court" was held to be neither in form nor substance an appeal. *Ibid.*

#### Election of Remedy.

An employee of a subscriber under the workmen's compensation act, who received an injury under circumstances creating a legal liability in a street railway company, not his employer, to pay damages in respect thereof, brought an action of tort against the street railway company to recover damages for his injury and afterwards gave notice to the insurer of his employer that he claimed compensation for his injury under the workmen's compensation act, and it was held that the bringing of the action before notice to the insurer was an election by which both the employee and the defendant in the action at law were bound, and that the plaintiff's right to recovery was not barred by his subsequent notice under the workmen's compensation act. *Labuff v. Worcester Consolidated Street Railway*, 170.

In the case above described it was said that, the plaintiff's election of remedy having been complete before his notice to the insurer of his employer, it was not necessary to consider whether a subsequent notice of withdrawal to the insurer operated as a waiver of the claim to compensation. *Labuff v. Worcester Consolidated Street Railway*, 170.

*To whom Act applies.*

A driver in the general employ of an ice company, who was let for hire by the ice company with a pair of horses and a wagon to a coal company and was injured, was held, under the circumstances, at the time of his injury to have been acting as an employee of the coal company and not as an employee of the ice company, and it was ordered that a decree of the Industrial Accident Board awarding him compensation to be paid by the insurer of the ice company should be reversed. *Scribner's Case*, 132.

By St. 1913, c. 568, unchanged by St. 1914, c. 708, § 13, amending § 2 of Part V of the workmen's compensation act by excepting from the operation of that act "masters of and seamen on vessels engaged in interstate or foreign commerce," a longshoreman employed to shovel coal in discharging the cargo of a schooner engaged in interstate commerce is not included in the exception made by the act itself. *Duart v. Simmons*, 313.

A longshoreman who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters has received a maritime injury in maritime work and, under the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the provisions of the workmen's compensation act do not apply to him. *Ibid*.

*Injuries to which Act applies.*

In a claim under the workmen's compensation act, a finding of the Industrial Accident Board, that the death of an employee of a coal dealer from the bursting of his aortic artery was not caused by a fall on the ice when he was delivering coal more than three months before, is a finding of fact, and where, as in the present case, there was evidence warranting the finding, it is not subject to revision by this court. *Knight's Case*, 142.

In a claim of a dependent widow under the workmen's compensation act, where the deceased employee in the course of his employment dropped a plank on the great toe of his left foot, injuring the toe severely, and three or four days later died at a hospital of septicemia, a finding by the Industrial Accident Board on conflicting evidence awarding compensation, which was confirmed by the Superior Court, was not disturbed on appeal. *Mallory's Case*, 225.

A finding by the Industrial Accident Board, that the death of an employee from acute miliary tuberculosis did not result from abrasions on his leg and foot received four months and a half earlier in the course of and arising out of his employment, is a finding of fact which will not be disturbed, if warranted by the evidence, as it was in the present case. *McCarthy's Case*, 259.

Upon a claim under the workmen's compensation act by the dependent widow of an employee, who collapsed and fell to the ground when he was swinging a heavy sledge hammer in breaking stones and died about five minutes later, it was held that a finding by the Industrial Accident Board that the cause

of the employee's death was conjectural, being one of fact, could not be set aside, there having been evidence to support it. *Weatherbee's Case*, 297.

In a claim under the workmen's compensation act by the dependent of an employee, who was found dead with his throat cut by a dangerous machine on which he worked and into which he had fallen, the burden of proof is upon the dependent to show that the employee was alive when he fell into the machine. *Dow's Case*, 348.

Application of the foregoing principle in a claim by the dependent of a boy of nineteen, who, when employed as the tender of a beaming machine, fell into it, and the Industrial Accident Board found that the "evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time," and awarded compensation to the dependent, it being held that this court could not say as matter of law that the conclusion of the board was unsupported by the evidence. *Ibid.*

In the same case it was contended by the insurer that, assuming that the employee was alive when he struck the machine, the cause of his fall was the proximate cause of his death and that the cause of his fall was unknown or conjectural, but it was held that the cause of his fall was the remote cause and that the fall itself was the dominant and proximate cause of the injury that resulted in death. *Ibid.*

It also was held that the fall into the machine from the place in front of it where the employee was standing in the active performance of his duty arose out of and in the course of his employment. *Ibid.*

In the same case it was said that the test in such a case is to consider, whether the danger of injury from a fall into or upon the machinery then being used by an employee is an incident of his employment and one to which he would not have been exposed apart from that employment. *Ibid.*

#### *Dependency.*

Under St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3, a child under eighteen years of age by a former husband of the widow of a deceased employee, who was a member of the employee's family at the time of his death, not being one of his next of kin, cannot receive compensation as a dependent. *Holmberg's Case*, 144.

Under the same statutes, a child under eighteen years of age of a deceased employee by a former wife, having therefore no surviving parent, who was not living with the deceased employee at the time of his death, is conclusively presumed to have been wholly dependent upon his father for support. *Ibid.*

And, where there are also a surviving widow and a child of her and the deceased employee, who were living with the employee at the time of his death, the compensation under the workmen's compensation act is to be awarded in equal shares to the widow and the two mentioned children of the employee, the third part due to the child of the widow to be paid to the widow, and the third part due to the child by the former wife to be paid to his guardian. *Ibid.*

In claims under the workmen's compensation act by the father and the mother of a minor son, it was held that the natural inference from the evidence was that the whole of the contribution of the employee was for the benefit of his father, who legally was entitled to the wages of his minor son and upon

whom as the head of the family rested the legal obligation to support his wife and children, that the father did not relinquish his right to the wages of the employee by turning them over to his wife as his agent in managing the finances of the family, and that accordingly the entire award should be made to the father. *Dembinski's Case*, 261.

#### *Amount of Compensation.*

In a claim under the workmen's compensation act by a partially dependent parent for the death of a minor child employed by a subscriber under the act which resulted from an injury arising out of and in the course of the child's employment, the measures of compensation under St. 1911, c. 751, Part II, §§ 6, 7, as amended by St. 1914, c. 708, §§ 2, 3, (c) are the "average weekly wages" of the employee and "the amount contributed by the employee" to the partially dependent parent out of such weekly wages, and no deduction is to be made for expenses incurred by the parent on account of the child. *Dembinski's Case*, 261.

#### *Agreement in Regard to Compensation.*

Where under the workmen's compensation act an injured employee and the insurer of his employer have reached an agreement in regard to the employee's compensation for his injury and have signed such agreement, the employee has no right to present his claim on the agreement before the Industrial Accident Board under St. 1911, c. 751, Part III, § 5, as amended by St. 1917, c. 297, § 2, unless the agreement was filed with the Industrial Accident Board and approved by the board as required by St. 1912, c. 571, § 9. *Courtney's Case*, 469.

In a claim under the workmen's compensation act this court found it unnecessary to consider whether the evidence justified a finding that the superintendent of the employer acted as the authorized agent of the insurer, and, if he did, whether he had authority to make and sign in behalf of the insurer an agreement with the employee as to compensation for his injury after the six months had expired during which by St. 1911, c. 751, Part II, § 15, as modified by St. 1912, c. 571, § 5, the employee was required to file his claim for compensation in the absence of mistake or other reasonable cause of his failure to do so. *Ibid.*

#### *Identity of Employer.*

A driver in the general employ of an ice company, who was let for hire by the ice company with a pair of horses and a wagon to a coal company and was injured, was held under the circumstances, at the time of his injury to have been acting as an employee of the coal company and not as an employee of the ice company, and it was ordered that a decree of the Industrial Accident Board awarding him compensation to be paid by the insurer of the ice company should be reversed. *Scribner's Case*, 132.

#### *Maritime Employment.*

A longshoreman, who is injured in the course of his employment in unloading the cargo of a vessel engaged in interstate commerce while she is lying in navigable waters, has received a maritime injury in maritime work and, under the decision in *Southern Pacific Co. v. Jensen*, 244 U. S.

- 205, the provisions of the workmen's compensation act do not apply to him. *Duart v. Simmons*, 313.

*Legal Services of Administrator.*

Disallowance of a petition under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 13, as amended by St. 1914, c. 708, § 7, by an administrator of the estate of a deceased employee for compensation from the insurer for legal services rendered in connection with his appointment because it did not appear that the appointment of the administrator required for carrying out the provisions of the act was "not otherwise necessary." *Mellon's Case*, 399.

WRONGDOER WITHOUT REMEDY.

In a suit in equity by one of the stockholders of a trading stamp corporation, which had conducted a monopolistic business in violation of St. 1908, c. 454, against the corporation and the other parties to the enterprise, it was said that, "The theory of the law is that general morality and business integrity are best promoted by not undertaking to aid repentant participants in executed illegal transactions" and by leaving them without remedy against one another. *Duane v. Merchants Legal Stamp Co.* 113.

No federal question was raised when this case was a second time before this court, and, moreover, if such a question was raised, it was held that the plaintiff had not been deprived of his property without due process of law and had not been denied the equal protection of the laws. *Ibid.*

*Duane v. Merchants Legal Stamp Co.* 227 Mass. 466, affirmed and declared not to be distinguishable from *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393. *Ibid.*

A judgment creditor of a corporation, who also was a stockholder, cannot maintain a suit in equity to restrain the foreclosure of certain mortgages executed by the corporation on the ground that the execution of the mortgages was not authorized by a valid vote of the directors, where it appears that the plaintiff had full cognizance of and acquiesced in the execution of the mortgages in controversy and also that he obtained his judgment by misleading the officers of the corporation and preventing them from contesting the action in which he obtained it. *Soghomonian v. Garabedian*, 445.

The surety on a bond which was given to ensure the faithful performance of an unlawful contract, cannot be held liable for a breach of the bond by the principal, because the courts will not enforce the obligation of an unlawful contract. *Boylston Bottling Co. v. O'Neill*, 498.

At the trial of an action, in which the validity of the contract of employment of a driver for a liquor dealer under a fourth class license was involved, it was assumed by the parties that certain sales of the packages of liquor procured by the driver for his employer from a brewery and labelled by him for delivering to customers of his employer in Boston were lawful, but it was said that this assumption was wrong, as the license authorized a sale on the premises described in it and the premises described in the dealer's fourth class license were its place of business owned by it; and on the facts stated above it did not appear that the sales in Boston were made on the premises of the dealer described in its license. *Ibid.*





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